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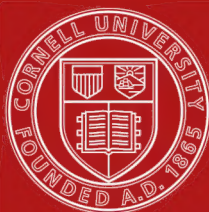
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**A treatise on the law of railways /**



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A  
TREATISE  
ON  
THE LAW OF RAILWAYS.

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BY  
DAVID RORER,  
OF THE IOWA BAR.

AUTHOR OF RORER ON JUDICIAL AND EXECUTION SALES, AND RORER  
ON AMERICAN INTER-STATE LAWS.

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# THE LAW OF RAILWAYS.

## VOL. II.

### CHAPTER XXXIV.

#### INJUNCTIONS.

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**1. Against the company; general principles.**—It is a general principle that, forasmuch as railroads operated by corporations as common carriers are of a *quasi* public nature, therefore courts are reluctant to grant injunctions which may have the effect to stop their regular operations, as such a result must always seriously and injuriously affect the commerce and interest of the

public, and greatly inconvenience the people.<sup>1</sup> Therefore such relief will only be given where the injury is great and irreparable, and no adequate remedy is given at law. The case made must be an urgent one, to justify such extraordinary interference and consequences.<sup>2</sup>

These seem to be the ruling principles asserted by the courts upon this subject, in reference to railroads, where the matter remains as at common law, and on the broad principles of equity jurisprudence. But whilst these ancient landmarks are still the judicial guides in some of the states, as to the granting or denial of injunctions against railroad corporations, in others there has been more or less of special legislation on the subject, and sometimes awarding this remedy where it were otherwise, as upon general principles of equity practice, not attainable.

Upon the filing of an answer, verified by affidavit, denying the matters alleged in the bill or complaint upon which a temporary injunction is granted, it should be dissolved.<sup>3</sup> An order granting a preliminary injunction upon complaint, answer and affidavits of the parties, is so far a matter of discretion, that it will not be reversed unless such discretion is abused, even if most of the allegations of the complaint and plaintiff's affidavits are denied by the answer and defendant's affidavits.<sup>4</sup>

If the court ordering an injunction has jurisdiction to grant it, and to judge whether the case before him is one demanding it, then, whether he judge erroneously or not, when granted it is valid, and until dissolved must be obeyed.<sup>5</sup>

An injunction should never be granted because of the mere apprehension of the petitioner that a wrong may be done. There should be substantial ground for the apprehension, and that the injury will be serious, and practically irreparable.<sup>6</sup> Thus a

<sup>1</sup> *Torrey v. The Camden & Atlantic R. R. Co.*, 3 C. E. Green's New Jersey Ch. Reps. 293.

<sup>2</sup> *Whittlesey v. The Hartford, Providence & Fishkill Railroad Company*, 23 Conn. 421; *Hackensack Imp't Commission v. New Jersey Midland Ry. Co.*, 7 C. E. Green (N. J. Ch. Reps.), 94; *Mocanaqua Coal Co. v. Northern Cent. Ry. Co.*, 4 Brewster, 158; *Cook v. North & South R. R. Co.*, 46 Ga. 618, 11 Am. Ry. Rep. 424.

<sup>3</sup> *Aurora & Cincinnati R. R. Co. v. Miller*, 56 Ind. 88, 18 Am. Ry. Rep. 144.

<sup>4</sup> *Coolot v. Central Pacific R. R. Co.*, 52 Cal. 65, 21 Am. Ry. Rep. 211.

<sup>5</sup> *The Erie Ry. Co. v. Ramsey*, 45 N. Y. (6 Hand), 637; *Schell v. Erie Ry. Co.*, 51 Barbour, 368.

<sup>6</sup> *Goodwin v. New York, New Haven & Hartford R. R. Co.*, 43 Conn. 494, 11 Am. Ry. Rep. 9.

stockholder can not obtain an injunction restraining the officers of the company from granting passes to state officers and legislators, without proof that the act is actually in contemplation.<sup>1</sup> Nor should an injunction be granted which, while injurious to the defendant, is of no special benefit to the plaintiff.<sup>2</sup>

**2. Against the company, at the suit of a private party, for injury common to the whole public.**—It is a well settled principle that an injunction will not lie, at the suit of a private person, to restrain or prevent a public nuisance, merely as such.<sup>3</sup> Therefore a railroad company will not be restrained by injunction, on the application of a private individual, from committing an act or doing that which will amount to a public nuisance—as interfering with common right—where the applicant fails to show any special damage or peculiar injury to himself, distinct from that which is suffered by the public at large. If the act sought to be restrained is in derogation of a right or privilege which is common to the people generally, as well as to the plaintiff or complainant—as for the obstruction of a public way, water-course or public inlet of water—it matters not that the petitioner be affected thereby more seriously than others, by reason of his residence or business requiring a more frequent use of the privilege; yet the injury being of the same character with that suffered in common with him by all others, the remedy by injunction will not be granted on such individual application.<sup>4</sup>

The case cited from 62 Penn. St. was instituted by private parties, shippers on the road, to restrain the Cumberland Valley Railroad Company from a violation of its public franchise, in respect to charges of freights for transportation, and tolls for use of the road, by complainant's own cars, and for discrimination therein. It appeared from the evidence that the two persons complaining were separately engaged in diverse business—one a dealer in grain, plaster and salt, and the other a dealer in coal and lum-

<sup>1</sup> Goodwin v. N. Y., N. H. & H. R. R. Co.

<sup>2</sup> Joliet & Chi. R. R. Co. v. Healy, 94 Ill. 416.

<sup>3</sup> Bigelow v. The Hartford Bridge Co., 14 Conn. 565; Seeley v. Bishop, 19 Conn. 135; Black v. Phila. & Reading R. R. Co., 58 Penn. St. 249; Cumberland Valley Railroad Co's

Appeal, 62 Penn. St. 218; Denver & Swansea Ry. Co. v. Denver City Ry. Co., 2 Col. 673, 20 Am. Ry. Rep. 339.

<sup>4</sup> O'Brien v. Norwich & Worcester R. R. Co., 17 Conn. 372; S. C. 2 Am. R. W. Cas. 90; Black v. Phila. & Reading R. R. Co., 58 Penn. St. 249; Hodgkinson v. Long Island R. R. Co., 4 Edwards' Ch. 411.



ber; and that there was no community of interest between them. The court held that the bill was not subject to the objection of multifariousness. But the court further held, upon the merits, that an injunction will not be granted for "an injury common to the whole public—a violation of a public franchise"; and said: "The rule is well settled, that where the injury is no greater to a plaintiff than to the inhabitants at large, the remedy to redress the subject of complaint is with the public"; and the bill was accordingly dismissed.<sup>1</sup>

The case of *Black v. The Philadelphia & Reading Railroad Company*, *supra*, was a bill in equity to restrain the erection and use of a railway in the street opposite complainant's property; and the ground alleged was that of not only a public nuisance, by obstruction of the street, but also a private nuisance to complainant's premises, and the causing of special damage to his adjoining property, not incurred by the public generally. The court, in disposing of the case, say: "The track complained of is in certain public streets, and not upon any property of the plaintiff's, and, if a nuisance, is a public one, which could be the subject of a public prosecution, which the Commonwealth have not deemed proper to institute. The plaintiffs are therefore bound to make out two things: 1st, that this is a public nuisance; and, 2d, that the plaintiffs have sustained special damage, which if they do not prove, renders the first question immaterial. We do not think that the plaintiffs have, by the single witness examined by them, established that they have suffered an injury quite distinct from that of the public in general, \* \* \* and of course upon that ground the decree (of dismissal) below should be affirmed."<sup>2</sup>

So in Wisconsin it is held that an injunction will not lie, at

<sup>1</sup> *Cumberland Valley Railroad Co's Appeal*, 62 Penn. St. 218, 226. To the same point, see also, *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565; *Sparhawk v. The Union Passenger R. W. Co.*, 54 Penn. St. 401.

<sup>2</sup> 58 Penn. St. 252. And see *Denver & Swansea Ry. Co. v. Denver City Ry. Co.*, *supra*. This was a bill by a horse railway company, having an exclusive franchise in a city, against a

steam railway company, constructed in a street not occupied by the complainant. It was held not such a special injury to complainant as equity would enjoin. But if there had been an unauthorized interference with lines in actual operation, and one complainant was building for the purposes of a steam railway, it would afford ground for an injunction: *Ibid.*

the suit of a private individual or of a corporate town, to restrain the commission of a public nuisance; as the obstructing of a highway, or the obstructing of a navigable river by driving piles therein. The remedy is by indictment.<sup>1</sup> Or if the town has such an interest, apart from the public generally, as might enable it to maintain such a remedy, and yet the right of the party to commit the act complained of be doubtful only, then the remedy by injunction will only lie after the party claiming it has established, by an action at law, the right to prevent the commission of the act.<sup>2</sup> Thus a railroad company will not be restrained by injunction, in a doubtful case, from driving piles to erect a bridge in a navigable stream.<sup>3</sup>

But if the act complained of be the cause of special damage to a private citizen, different in character from that resulting therefrom to the public generally, then, although the thing complained of be in fact a public nuisance, indictable in law, yet such private person may maintain his bill to abate it, or to enjoin a recurrence of it; and this, too, without the concurrence or name of the Attorney General, or attorney for the state, connected with the bill as complainant; for the fact of the defendants violating the rights of the public, as well as those of a private person, is no defense against a suit of such private person for the injury, or to restrain it.<sup>4</sup>

### 3. Against the company, to prevent obstruction of highway.

—An injunction will be granted, at the suit of the state, to enjoin a railroad company from an unauthorized encroachment on a public highway, although the same may be fallen somewhat into neglect and disuse. It will be no excuse, therefore, that the highway or canal is practically abandoned, for no neglect is

<sup>1</sup>Town of Sheboygan v. Sheboygan & Fond du Lac R. R. Co., 21 Wis. 667.

<sup>2</sup>Town of Sheboygan v. Sheboygan & Fond du Lac R. R. Co., 21 Wis. 667.

<sup>3</sup>Town of Sheboygan v. Sheboygan & Fond du Lac R. R. Co., 21 Wis. 667.

<sup>4</sup>Spencer & Ward v. The London & Birmingham Railway Co., 1 Eng. R. W. & Canal Cases, 159; O'Brien v. Norwich & Worcester R. R. Co., 17

Conn. 372; Pettis v. Johnson, 56 Ind. 139; Hickey v. Chi. & Western Ind. R. R. Co., 6 Bradw. (Ill.), 172; Miller v. Long Island R. R. Co., 10 Repr. 197 (U. S. Cir. Ct., E. Dist. N. Y.). Where it is certain, by the case made, that the company are exceeding their powers to the injury of a party, and a suitable case exists otherwise for such equitable interference, an injunction will be granted: River Dun Nav. Co. v. The North Midland R. W. Co., 1 Eng. R. W. & Canal Cases, 135.

chargeable against the state.<sup>1</sup> The case here cited from 24 Pennsylvania State arose in this wise: The Pittsburgh and Connellsville Railroad Company assumed to fill up and arch over one of the locks of the state canal at Pittsburgh, in the construction of their road, under the pretext that such part of the canal had been of no valuable use to the state, and had for many years been in a condition of utter abandonment and desolation. On application of the Commonwealth the act was enjoined.<sup>2</sup>

**4. Against the company, to prevent abuse of corporate power.**—Although a subscriber to the capital stock of a private corporation may, by injunction prosecuted against the company of which he is a member, prevent the diversion of the funds of the company to a different purpose than the one contemplated by the organization and the law,<sup>3</sup> yet, to do so, the application

<sup>1</sup> *Atty. Genl. v. Metropolitan R. R. Co.*, 125 Mass. 515; *Atty. Genl. v. Del. & B. B. R. R. Co.*, 12 C. E. Green, 1, 631; *Atty. Genl. v. Lombard & S. Sts. Pass. R. R. Co.*, 10 Phil. 352; *Commonwealth v. Pittsburgh & Connellsville R. R. Co.*, 24 Penn. St. (12 Harris), 159. And see also, *Kemp v. The London & Brighton R. W. Co.*, 1 Eng. R. W. & Canal Cases, 495; *Playfair v. Birmingham, Bristol & Thames Junction R. W. Co.*, 1 Eng. R. W. & Canal Cases, 641; *Bell v. The Hull and Selby R. W. Co.*, 1 Eng. R. W. & Canal Cases, 616. But in England, where the application is on the relation of private persons, after acquiescence on their part until the erections are partly made, and where the application involves disputed legal rights of the company, a removal of obstructions already made will not be ordered, nor future work enjoined, if the company put themselves under agreement and rule to comply with subsequent final orders of the court in that respect; and the final hearing in equity will be stayed to await a trial of the legal right at law: *Atty. Genl., ex rel. Fawcett et*

*al., v. Manchester & Leeds R. W. Co.*, 1 Eng. R. W. & Canal Cases, 436. Where the injunction is dissolved upon the defendants paying into court, as security, the amount of damages, and thereupon they obstruct the highway, they are liable for interest on such amount from the dissolution of the injunction: *Carpenter v. Easton & Amboy R. R. Co.*, 28 N. J. Ch. 390, 14 Am. Ry. Rep. 195. The proceeding is controlled by the law officer of the state, though instituted on behalf of private parties: *People v. Cent. Cross-town R. R. Co.*, 21 Hun, 476.

<sup>2</sup> In this case the Supreme Court of Pennsylvania say, LOWRIE, J.: "When railway companies or individuals exceed their statutory powers in dealing with other people's property, no question of damages is raised when an injunction is applied for; but simply one of the invasion of a right." Thus the court responded to the objection of the railroad company that the damage was not irreparable.

<sup>3</sup> *Booker, Ex parte*, 18 Ark. 338; *Miss., Ouachita & Red River R. R. Co. v. Cross*, 20 Ark. 443; *Stevens v. The*



must be timely. He may not sleep upon his rights for an indefinite time, till interests have vested or work progressed of an exceptionable character, and then apply for equitable relief therein.<sup>1</sup> Nor can he stand by and acquiesce in such diversion of the enterprise until sued for his own subscription to the stock, and then successfully plead such misdirection of the enterprise as a defense to the action.<sup>2</sup> To enable a stockholder to have the benefit of an injunction to restrain the violation of, or departure from, the original objects of the charter of the company, he must show himself to have been diligent in the prompt use of all the means in his power to prevent such departure; and may not wait until the mischief is mainly consummated, and extensive expenditures made by the company, before calling on a court of equity for relief.<sup>3</sup>

But although an injunction will lie, at the suit of a stockholder, to prevent the diversion of the corporate enterprise to a different purpose than that contemplated by the charter, to the injury thereby of his corporate interests, yet it will not lie to prevent a measure for the reason that its consummation will be injurious to other interests of such stockholders; and more especially so, where the measure contemplated is in accordance with the spirit of the enterprise.<sup>4</sup> Hence, where the injury alleged is, as was the case in the reference just cited, that the terminus of the road is about to be extended through a city to a navigable river bounding the same, instead of making the terminus in the city, to the disadvantage of complainant, an injunction will be denied.<sup>5</sup>

And an injunction will not lie, at the suit of a stockholder, to restrain a railroad corporation from engaging in extended or

Rutland & Burlington R. R. Co., 29 Vt. (3 Williams), 545; Rogers v. Lafayette Agr. Works, 52 Ind. 296.

<sup>1</sup> Booker, *Ex parte*, 18 Ark. 338; Doane v. Treasurer of Pickaway, Wright's (Ohio) R. 752.

<sup>2</sup> Booker, *Ex parte*, 18 Ark. 338; Witter v. Miss., Ouachita & Red River R. R. Co., 20 Ark. 463; Memphis Branch R. R. Co. v. Sullivan, 57 Ga. 240; Payson v. Stoeber, 2 Dill. 427; Chetlain v. Republic Life Ins. Co., 86

Ill. 220.

<sup>3</sup> Chapman and Harkness v. The Mad River and Lake Erie R. R. Co., & The Sandusky City & Ind. R. R. Co., 6 Ohio St. 119; Cozart v. Ga. R. R. & Bkg. Co., 54 Ga. 379; Chetlain v. Rep. Life Ins. Co., *supra*.

<sup>4</sup> Baltimore & Ohio R. R. Co. v. City of Wheeling, 13 Gratt. 40.

<sup>5</sup> Baltimore & Ohio R. R. Co. v. City of Wheeling, 13 Gratt. 40.

enlarged enterprises of the same kind, but other than that contemplated by the original charter, if such charter, or the general law governing the same, permit amendments or alterations thereof by legislative enactment, and such new or enlarged enterprise be sanctioned by a legislative act, and by a vote of a majority of the stockholders of such railroad company.<sup>1</sup> The case is different from that relation which arises from an agreement to take and pay for stock, and the character of the enterprise is materially changed after making, and before payment of, the subscription. The latter relation rests on a merely executory agreement, whereas the relation of one who is a full stockholder makes him one of the corporate body which does the act complained of, and which act, as one of such body, he is himself privy to, and is bound by, as one of the members. For whoever becomes a member of such a corporation aggregate, agrees, by necessary implication, that he will be bound by the action of the majority in relation to whatever comes within the scope of the charter powers, or may be brought within the same by amendments, when such are allowed by the law of the original charter, or a general law in force at its adoption or acceptance.<sup>2</sup>

**5. Against the company, to prevent private nuisance.**—A corporation chartered to build a railroad for the accommodation of the public, can not transfer its franchise to a private party, so as to enable him to build a railroad exclusively for his own private use.<sup>3</sup> And if, under such color of authority, a private individual, assuming to erect and operate a railroad for his own exclusive use and benefit, do unauthorized acts, amounting to a nuisance, to a person's dwelling, by continuously interrupting his egress and ingress to his premises, or other acts of annoyance, equity will inhibit the same by perpetual injunction, at the suit of the injured party.<sup>4</sup> And, generally, a bill for an injunction to prevent

<sup>1</sup> *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen, 230.

<sup>2</sup> *Durfee v. Old Colony and Fall River R. R. Co.*, 5 Allen, 230, 243, 245. See *Black v. Del. & R. Canal Co.*, 7 C. E. Green, 130; *S. C.* 9 Id. 455; *Rogers v. Lafayette Agr. Works*, 52 Ind. 296; *Hedges v. Paquett*, 3 Oreg. 77; *New Haven & D. R. R. Co.*

*v. Chapman*, 38 Conn. 56.

<sup>3</sup> *Stewart and Foltz's Appeal*, 56 Penn. St. 413. See *State v. Consolidation Coal Co.*, 46 Md. 1; *Atlantic & Pac. Tel. Co. v. Un. Pac. Ry. Co.*, 1 McCrary, 541; *S. C.* 1 Fed. Repr. 745.

<sup>4</sup> *Stewart's Appeal*, *supra*. And without prejudice to such injunction, an action of trespass will also lie: *Id.*

a nuisance may be maintained by any person suffering special damage.<sup>1</sup>

The charter of a corporation will not be construed to authorize the creation of a nuisance.<sup>2</sup>

**6. Against the company, to prevent taking or using right of way.**—In Wisconsin the ruling is, under the act of May 10, 1858, that an injunction will lie to prevent the taking of permanent possession of railroad right of way grounds, where it is made to appear that the company is about to, or threatens to, take permanent possession without first causing the amount of compensation to be legally ascertained, and without making payment for the same;<sup>3</sup> but not upon the bare allegation that no

<sup>1</sup> *Pettis v. Johnson*, 56 Ind. 139; *Hickey v. Chi. & Western Ind. R. R. Co.*, 6 Bradw. (Ill.), 172; *Miller v. Long Island R. R. Co.*, 10 Repr. 197 (U. S. Cir. Ct., E. Dist. N. Y.). See, as to joinder of parties injured in one suit as complainants, *Cadigan v. Brown*, 120 Mass. 493.

<sup>2</sup> *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Babcock v. N. J. Stock Yards Co.*, 5 C. E. Green, 296.

<sup>3</sup> *Shepardson v. Milw. & Beloit R. R. Co.*, 6 Wis. 612; *Powers v. Bears*, 12 Wis. 222; *Bohlman v. The Green Bay & Lake Pepin R. W. Co.*, 30 Wis. 105; *Diedrichs v. The Northwestern Union R. W. Co.*, 33 Wis. 219; *Bohlman v. Green Bay & Minn. Ry. Co.*, 40 Wis. 157, 13 Am. Ry. Rep. 421; *Henderson v. N. Y. Cent. R. R. Co.*, 78 N. Y. 423; *Holbert v. St. Louis, Kansas City & Northern R. R. Co.*, 45 Ia. 23; *Evans v. Mo., Ia. & Neb. Ry. Co.*, 64 Mo. 453; *Northern Pac. R. R. Co. v. St. Paul, M. & M. Ry. Co.*, 1 McCrary, 302; S. C. 1 Am. & Eng. R. R. Cas. 12. And see *Redman v. Philadelphia, Marlton & Medford R. R. Co.*, 33 N. J. Eq. 165; S. C. 1 Am. & Eng. R. R. Cas. 1; *Northern Pac. R. R. Co. v. Barnesville & M. R. R. Co.*, 1 Am. & Eng. R. R. Cas. 8. But an injunction

will not lie to restrain the company from the use or occupancy of a right of way already in its possession, where the possession is by permission, express or implied, of the owner: *Bohlman v. Green Bay & Lake Pepin R. W. Co.*, *supra*; *Northern Pacific R. R. Co. v. Barnesville & Moorhead R. R. Co.*, 1 Am. & Eng. R. R. Cas. 8 (U. S. Cir. Ct., Dist. Minn., 1880). The charter of the Northern Pacific R. R. Co., granted by Congress, confers the power to enter upon land before making compensation; and it is held such power does not conflict with the Constitution of the United States: *N. P. R. R. Co. v. B. & M. R. R. Co.*, *supra*. It does not exempt the company, however, from the operation of the laws of eminent domain, when invoked by other companies to condemn a crossing over its road: *Northern Pac. R. R. Co. v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 1 McCrary, 302; S. C. 1 Am. & Eng. R. R. Cas. 12. The remedy is available against any one in possession, claiming under the company making the entry: *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653.

compensation for the right of way has been made.<sup>1</sup> Payment for the right of way is, in Wisconsin, a condition precedent to the permanent use thereof.<sup>2</sup>

But although an injunction is allowed by the statute, at the suit of the landholder, to restrain the company from using the right of way until paid for, under ordinary circumstances, yet it will not be awarded where the granting of the same will be against good conscience, as where the party has himself invited the doing of the act of which he complains.<sup>3</sup> Thus, where a railroad company changed the location of its road, and placed the same on a landholder's premises at his own request, and under promise of giving the right of way, in such case the writ will not be allowed.<sup>4</sup> Or where the landholder sells the right of way to the company, and permits its taking and appro-

<sup>1</sup> *Diedrichs v. The Northwestern Union R. W. Co.*, 33 Wis. 219.

<sup>2</sup> *Lee v. The Northwestern Union R. W. Co.*, 33 Wis. 222, 224. But it is held by the U. S. Circuit Court for the District of Minnesota, that where a prompt assessment of damages can not probably be had, and where the right of complainant to such damages is disputed and doubtful, a court of chancery may require a bond to be given, and allow the construction to go on. This is done as within the ordinary powers of a court of chancery, which are administered by the federal courts (they hold, in this case,) irrespective of local laws and state practice: *Northern Pacific R. R. Co. v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 2 McCrary, 260; *S. C. 1 Am. & Eng. R. R. Cas.* 15; *Cairo & F. R. R. Co. v. Turner*, 31 Ark. 494; *Curtis v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*, 21 Minn. 497. Upon failure to pay the bond, an injunction should be granted: *Cairo & F. R. R. Co. v. Turner*. And so, where a stay of execution is agreed to, upon failure to pay at the expiration of the time, an injunction may be granted: *Irish v. Burlington & S. W. R. R. Co.*, 44 Ia. 380. In New York the company has been permit-

ted to pay the compensation found due by the court, on an application for an injunction, and retain possession of the land: *Henderson v. N. Y. Cent. R. R. Co.*, *supra*.

<sup>3</sup> *Pettibone v. The La Crosse & Mil. R. R. Co.*, 14 Wis. 443; *Atty. Genl. v. Del. & B. B. R. R. Co.*, 12 C. E. Green, 1; *Meredith v. Sayre*, 5 Stew. (N. J.), 557; *Jefferson v. L. P. R. R. Co. v. City of New Orleans*, 31 La. Ann. 478; *Cape Girardeau & B. M. G. Road v. Renfroe*, 58 Mo. 265. But see *Murdock v. Prospect Park & Coney Island R. R. Co.*, 73 N. Y. 579. Nor, where the railroad company has entered with the consent of the devisee for life and the trustee in possession, after making compensation to them, and has nearly completed construction, will an injunction be granted to complainants claiming to be remainder men: *Lanternman v. Blairstown Ry. Co.*, 28 N. J. Ch. 1, 14 Am. Ry. Rep. 1.

<sup>4</sup> *Pettibone v. The La Crosse & Mil. R. R. Co.*, 14 Wis. 443. But a parol license, granted by one railroad company to another, allowing the latter to enter upon the right of way of the former and construct a crossing, is revo-

priating the lands under promise of payment, and the company fails to pay, the remedy by injunction under the statute is not available. It is only allowable when the taking and appropriation has been without the consent of the owner, as, for instance, under the right of eminent domain.<sup>1</sup>

If the taking has occurred without either the consent of the owner or by the right of eminent domain, it is wrongful, and in Wisconsin an action for damages will lie.<sup>2</sup> But an injunction will not lie, under the statute, for non-payment of a judgment in trespass.<sup>3</sup> And trespass will not lie against the company for entering upon lands which have been condemned under the statute, and paid for by the company, as its right of way. When the action would not lie against the company, it will not lie against the agent of the company.<sup>4</sup>

Where, by an agreement with the grantees of a mortgagor of land, made subsequent to the mortgage, a railroad company had acquired the right to construct approaches to their tunnel over the mortgaged land, and railroad tracks thereon, without making compensation therefor, it was held that the court would not inquire into the right of the company, on a petition by a receiver appointed under foreclosure proceedings, for an injunction to restrain the company from using the land, and where the respondents were not made parties to the bill to foreclose.<sup>5</sup> Under the circumstances of the case, the mortgagee was held not estopped by acquiescence.<sup>6</sup> The work was allowed to go on, under conditions for securing payment.<sup>7</sup>

cable: *N. P. R. R. Co. v. B. & M. R. R. Co.*, *supra*.

<sup>1</sup> *Vilas v. The Mil. & Miss. R. R. Co.*, 15 Wis. 233; *Pettibone v. La Crosse & Mil. R. R. Co.*, 14 Wis. 443. In England a judgment must first be obtained: *Latimer v. Aylesbury & B. Ry. Co.*, Law Rep. 9 Ch. Div. 385. But an agreement for a stay of execution will not have that effect: *Irish v. B. & S. W. R. R. Co.*, *supra*.

<sup>2</sup> *Pomeroy v. Chicago & Mil. R. R. Co.*, 16 Wis. 640; *Loop v. Chamberlain*, 20 Wis. 135. And see *Hibbs v. Chicago & Southwestern Ry. Co.*, 39 Ia 340; *Harlow v. Marquette, H. & O. R. R. Co.*, 41 Mich. 336; *Maxwell*

*v. Bay City Bridge Co.*, *Id.* 453.

<sup>3</sup> *Andrews v. Farmers' Loan & Trust Co.* and another, 22 Wis. 288, 292. In Iowa, however, an injunction will lie to restrain the company or its lessee from continuing to operate its road after an award of damages under the statute, until the damages are paid: *Hibbs v. Chicago & S. W. Ry. Co.*, *supra*.

<sup>4</sup> *Burns v. Dodge*, 9 Wis. 458.

<sup>5</sup> *Coe v. New Jersey Midland Ry. Co.*, 28 N. J. Ch. 27, 14 Am. Ry. Rep. 5.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

The writ of injunction will not be awarded, in Wisconsin, to restrain a railroad corporation from entering and erecting its railroad upon the line located through the lands of a person, upon the mere allegation that no compensation has been made therefor, although damages are alleged to have been assessed at the instance of the company. To enable the landowner to avail himself of such remedy, he must aver and show that the company threaten to take permanent possession thereof without paying for the same.<sup>1</sup> If, however, such averments be made as show that the company threatens to, or is about to, take permanent possession without having, in some manner, by legal means, caused the amount to be paid to be determined upon, and without tender or payment of the same, an injunction in Wisconsin will lie.<sup>2</sup> Likewise, if the company are proceeding to assess or take land for the right of way, or other railroad uses, in a manner unauthorized by the statute, or without complying with the requirements thereof, an injunction will be awarded to restrain it from thus violating the rights of the landholder. As, for instance, if the taking be allowable only after the passage of a resolution of the board of directors declaring the same necessary for the purposes designated in the statute, and no such resolution be passed, or, being passed, its passage is by too small a number of directors to form a quorum, the taking will be enjoined.<sup>3</sup> But, by the act of Wisconsin of 1861, the right to inaugurate proceedings, to assess damages, where a railroad company appropriates property for its right of way without making compensation, and without causing an assessment, is conferred upon the property holder, and the statutory right to an injunction restraining the company from the use of the road until payment, is limited to cases where assessments have been made and there is default in payment. Under the prior law, the right to set assessment proceedings on foot was confined to the company; and for proceeding to occupy permanently without doing so, or if an assessment was made, and the

<sup>1</sup> *Diedrichs v. The Northwestern Union R. W. Co.*, 33 Wis. 219, 221.

<sup>2</sup> *Diedrichs v. The Northwestern Union R. W. Co.*, 33 Wis. 219, 221; *Bohlman v. Green Bay & Lake Pepin Ry. Co.*, 30 Wis. 105. And so in *Maryland: New Cent. Coal Co. v. George's*

*Creek Coal & Iron Co.*, 37 Md. 537.

<sup>3</sup> *Stringham v. The Oshkosh & Miss. R. R. Co.*, 33 Wis. 471; *Boston & Lowell R. R. Co. v. Salem & L. R. R. Co.*, 2 Gray, 1; *Jersey City Gas Co. v. Dwight*, 2 Stew. (N. J.), 242.

company was proceeding to occupy without paying the same, an injunction lay. But, as modified, the statute now gives the injunction only for omitting to pay the assessment, to cause the making of which both parties now have the power.<sup>1</sup>

In Maine, an injunction to restrain a railroad company from the use of its right of way, on the ground of non-payment of the judgment for damages assessed for such right of way by the court of county commissioners, will be denied, by analogy to the statute of limitations, if six years have elapsed since the rendition of the judgment, such commissioners court not being a court of record, and the limitation of actions in said state being, by statute, six years upon all judgments not of a court of record. The court say: "If the plaintiff could not recover, in a suit on his claim, he can not have this summary remedy by injunction. His legal right to the payment of damages, and to enforce that right at law, must be shown."<sup>2</sup>

Nor will an injunction lie, under the statute of Maine, to restrain the use of a right of way by a railroad company, at the suit of the assignee of the claim and judgment for damages awarded to the landholder for the same. The language of the statute is not broad enough to cover the case of an assignee of the money awarded. The Supreme Judicial Court of Maine, APPLETON, Chief Justice, say: "The rights of the owner of the land taken are to be protected by the proceedings in equity. The bill is to be filed by the one owning the estate used and occupied. The injunction is against the use and occupation of *his* land taken. \* \* The redress by injunction is given to the owner of the estate used and occupied, and to no one else." If the assessment money be not paid or secured, as required by the statute, it is the owner of the land over which the right of way is taken, and no one else, who may maintain such proceeding.<sup>3</sup>

<sup>1</sup> *Andrews v. Farmers' Loan & Trust Co.* and another, 22 Wis. 288.

<sup>2</sup> *Mooers v. The Kennebec & Portland R. R. Co.*, 58 Maine, 279, 281. But see *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653, 13 Am. Ry. Rep. 468. It is also held in this case, that as the statute allows the railroad company thirty days to pay the damages assessed for its right of

way, after demand of payment thereof, no injunction would lie merely for non-payment, unless it was shown that such demand had been made more than thirty days before the making of the application for allowance of the writ: *Ib.* 282.

<sup>3</sup> *Illsley v. The Portland and Rochester R. R. Co.*, 56 Maine, 531, 537.

And a railroad company entering into premises of a landowner for the construction of its road, under a license from such landholder, and afterward violating the terms thereof, will be enjoined from continuing to construct and complete the road through such premises other than in conformity to the terms of the license, or else until payment of the damages for the right of way be made or secured.<sup>1</sup>

An injunction will not lie to restrain the construction of a railroad on trestle work in a public street, on the application of an abutting landholder, upon the bare allegation in the bill that the construction will work an irreparable injury, without any showing or averment as to how or in what manner it will be irreparable. Such works are easily moved, if wrongful, and the injury, if any, will be thereby repaired; but before relief in equity will be given, either preventive or remedial, the rights of the parties should be tried and determined at law.<sup>2</sup>

Under the act of the Wisconsin assembly of May 10, 1858, if a railroad corporation take land for its right of way, depot grounds, or other railroad purposes, and appropriate the same to its use for the space of six months without making just compensation therefor, the landholder is entitled to an injunction restraining the company from the use of such lands until compensation therefor be made to those entitled to receive the same, and until the payment also of the costs of such injunction proceeding.<sup>3</sup>

**7. Against the company, to prevent suit for capital stock.**—If, by consolidation of a railroad company with another com-

<sup>1</sup> Unangst's Appeal, 55 Penn. St. 128; Evansville, H. & N. R. R. Co. v. Grady, 6 Bush, 144.

<sup>2</sup> Schurmeier v. The St. Paul & Pacific R. R. Co., 8 Minn. 113; Whitman v. The St. Paul & Pacific R. R. Co. and another, 8 Minn. 116.

<sup>3</sup> Davis v. The La Crosse & Mil. R. R. Co. and another, 12 Wis. 16; Ford v. Chicago & N. Western R. R. Co., 14 Wis. 609. A judgment rendered against the company for the damages in such proceeding for an injunction, will not be permitted to stand where there are liens against the land taken

which remain unprovided for; but the injunction will be sustained until compliance on the part of the company with the law requiring compensation to be made for the land taken and damages: Davis v. L. & M. R. R. Co., *supra*. Open possession by a railroad company of its right of way is sufficient evidence of title to sustain an injunction to prevent interference therewith by another company without its consent: Northern Pacific R. R. Co. v. St. Paul, Minneapolis & Manitoba Ry. Co., 1 McCrary, 302; S. C. 1 Am. & Eng. R. R. Cas. 12.



pany, such radical and fundamental change is made in the enterprise as to make it entirely a different one than the one contemplated by the original organization to which subscriptions have been made, the effect thereof is to wholly release subscribers from liability to pay subscriptions, whether the same be in the shape of subscriptions proper as to form, or of separate obligations; and in such case, if an effort is made at enforcement thereof, relief against the same will be afforded by injunction.<sup>1</sup>

Where a subscription to the capital stock of a corporation has been illegally and unauthorizedly made by a county, an assessment of taxes to pay the same is invalid in law.<sup>2</sup> And although a sale of land so assessed by the tax collector for such tax will be in like manner illegal and void, yet a sale thereof will be restrained by injunction, on application of the landowner, on the ground that such sale will place a cloud upon the title of the owner.<sup>3</sup> And though the law allows a county to subscribe for capital stock upon a vote of the inhabitants or voters of the county, and yet does not expressly require notice of the election to be given, nevertheless a vote or election had without notice will be invalid.<sup>4</sup> The notice should conform in such cases to those for general elections.<sup>5</sup>

An injunction will not lie to restrain a railroad corporation from the collection of capital stock upon the mere ground that the company are intending to expend the money, when collected, in the construction of the work in a county other than the one in which, by the alleged terms of subscription, it was to be expended, when in fact no such terms, restrictions or conditions exist in the written subscription paper or subscription. The writing itself is the evidence of the contract.<sup>6</sup> Nor will the alleged, or even the actual, insolvency of the company, work a release of the subscription, or afford ground for an injunction to restrain its collection; but on the contrary affords, in behalf of creditors, the greater necessity for collecting the dues and resources of the company.<sup>7</sup>

<sup>1</sup> Illinois Grand Trunk R. R. Co. v. Cook, Admr., 29 Ill. 237, 243.

<sup>2</sup> *McPike v. Pen*, 51 Mo. 63. But if the bonds, being negotiable, come into the hands of innocent holders before maturity, they are valid, and will be enforced: *State v. Saline County*

Court, 48 Mo. 390.

<sup>3</sup> *McPike v. Pen*, 51 Mo. 63.

<sup>4</sup> *McPike v. Pen*, 51 Mo. 63.

<sup>5</sup> *McPike v. Pen*, 51 Mo. 63.

<sup>6</sup> *Dill and others v. Wabash Valley R. R. Co.*, 21 Ill. 91.

<sup>7</sup> *Dill and others v. Wabash Valley*

**8. Against the company to prevent breach of contract to locate depot.**—The breach by a railroad company of a contract to locate its depot at a particular place, in consideration of a donation of the right of way and the ground to locate such depot on, is no cause for equitable interference, but is a matter for which a remedy is plainly attainable by suit at law, as in other cases actionable at law.<sup>1</sup> Such being the law, a court of equity, where no other ground of equitable interference is shown, will not interpose by an injunction to prevent a railroad company from locating its depot elsewhere than at the place contemplated by such contract, or to prevent a mere breach of the contract in that respect, but will leave the party to his action at law for damages, if any be by such breach sustained.<sup>2</sup> If the company, in such case, commit a breach of the contract, by locating its road elsewhere, and still appropriate to its continued use the right of way thus obtained or entered upon, the remedy of the owner is by an action for damages as to the breach, and by assessment and condemnation of the right of way, as to that branch of the injury, under the statute.<sup>3</sup>

**9. Against the company to restrain it from constructing branches before the main line.**—Where the ability of a railroad company to construct its main line is doubtful, it will be restrained, at the suit of a municipality which has subscribed for its stock and issued bonds therefor in aid of the main line, from wasting its means in constructing branch roads.<sup>4</sup> And where the branch, when completed, will be a complete user of the company's franchise, and will give it a continuous road between the *termini* named in its charter, but not passing through or near the plaintiff municipality, as the proposed main line did, and there is no apparent design to continue the road on such main line, the construction of the branch will be re-

R. R. Co., 21 Ill. 91; *Henry v. Vermillion & A. R. R. Co.*, 17 Ohio, 187; *Germantown Pass. Ry. Co. v. Fitler*, 60 Penn. St. 124.

<sup>1</sup> *Gallagher v. Fayette County R. R. Co.*, 38 Penn. St. 102.

<sup>2</sup> *Gallagher v. Fayette County R. R. Co.*, 38 Penn. St. 102.

<sup>3</sup> *Gallagher v. Fayette County R. R. Co.*, 38 Penn. St. 102. See *Pusey v.*

*Wright*, 31 Penn. St. 387; *Hornback v. Cincinnati & Zanesville R. R. Co.*, 20 Ohio St. 81; *Hubbard v. Kansas City, St. Jos. & C. B. R. R. Co.*, 63 Mo. 68; *Doe v. Leeds & Bradford Ry. Co.*, 16 Q. B. 796.

<sup>4</sup> *Town of Platteville v. Galena & S. Wis. R. R. Co.*, 43 Wis. 493, 17 Am. Ry. Rep. 1. But a railroad company will not be enjoined from

strained as a "diversion" of the road from such municipality, within sec. 23, ch. 119, of the Wisconsin laws of 1872.<sup>1</sup> And if, pending an appeal from an order against such a diversion, the company go on and build the branch, the order may nevertheless be reversed.<sup>2</sup>

**10. By the company to prevent taking depot grounds for public highway.**—Although an injunction will not lie, at the suit of a railroad company, to restrain the laying out and opening of a highway for mere irregularity in the proceedings, when there is no want, of a substantial nature, of a right to lay out and open the same,<sup>3</sup> yet an attempt to take the grounds of the company which are necessary for its depot purposes, engine houses, or other buildings at a station, for the purposes of an ordinary highway, is unlawful, and as against the right so to do, an injunction will be allowed.<sup>4</sup> And a legislative grant to run a highway across the track or tracks of a railroad, without compensation, does not authorize the running of the same through grounds acquired and necessary for station purposes, engine houses, turn-tables, or other necessary structures of the company, which can not, as highway and railroad crossings can, be used by the public and railroad company in common.<sup>5</sup>

**11. By the company to restrain levy for taxes.**—A bill in equity will lie to restrain the collection of an illegal tax, constituting an apparent lien.<sup>6</sup> An injunction, however, does not lie

constructing a part only of its line: *Aurora & Cincinnati R. R. Co. v. City of Lawrenceburgh*, 56 Ind. 80, 18 Am. Ry. Rep. 136; Same *v. Miller*, *Id.* 88, 18 Am. Ry. Rep. 144.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Albany Northern R. R. Co. v. Brownell and another*, 24 N. Y. (10 E. D. Smith), 345.

<sup>4</sup> *The Albany Northern R. R. Co. v. Brownell and another*, 24 N. Y. 345.

<sup>5</sup> *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345, 351. See *In re City of Buffalo*, 68 N. Y. 167; *S. C.* 64 N. Y. 547; *City of Bridgeport v. N. Y. & New Haven R. R. Co.*, 36 Conn. 255; *Danbury & Norwalk R. R. Co. v. Town of Norwalk*, 37 Conn. 109; *City*

of *Hannibal v. Hannibal & St. Jos. R. R. Co.*, 49 Mo. 480; *Northern Cent. Ry. Co. v. City of Balt.*, 46 Md. 425; *City of Atlanta v. Cent. R. R. & B. Co.*, 53 Ga. 120. Moreover, if such grounds be improved by buildings already erected thereon, then the taking them for an highway is prohibited by statute in New York, even in the possession of a natural person, unless compensation be made therefor: *A. N. R. R. Co. v. Brownell*, *supra*.

<sup>6</sup> *Marquette, Houghton & Ontonagon R. R. Co. v. City of Marquette*, 35 Mich. 504, 16 Am. Ry. Rep. 179; *Scofield v. City of Lansing*, 17 Id. 437. But the collection of the whole tax will not be enjoined simply because, in determining the valuation of an

to restrain a levy upon rolling stock for the collection of a tax, upon the mere allegation that the tax is illegal, and where no other valid ground for the writ is alleged. It does not lie to prevent the commission of a trespass, where neither insolvency of the party committing the act nor irremediable mischief is shown. The simple allegation of illegality is not enough.<sup>1</sup> Nor is it ground for allowing the writ that, by the statute, rolling stock is for some other purposes declared to be real estate. Such special status does not necessarily apply to purposes other than those contemplated by the statute. It is not general.<sup>2</sup>

aggregate property, exempt property may have been included as a factor: *Huck v. Chicago & Alton R. R. Co.*, 86 Ill. 352, 17 Am. Ry. Rep. 419. And the collection of a tax against one company, assessed upon its capital stock in excess of the value of its tangible property, will not be enjoined because the stock of other companies has been found by the board of equalization not to exceed in value its tangible property: *Chicago, Burlington & Quincy R. R. Co. v. Siders*, 88 Ill. 320, 21 Am. Ry. Rep. 304. The courts will not assume that, in all cases, the equalized value of stock exceeds the assessed value of tangible property: *Ibid.* Nor will the collection be restrained because the superstructure of the road (being of little value aside from the franchise to use it) is included in the valuation with the franchise, nor for errors of judgment in the assessors, or slight irregularities: *Ibid.*; *Kansas Pacific Ry. Co. v. Russell*, 8 Kans. 558, 5 Am. Ry. Rep. 232. To warrant such injunction, it should appear clearly that the assessment works such injury as a court of equity alone is competent to redress: *Ibid.*; *Parmley v. St. Louis, Iron Mountain & Southern R. R. Co.*, 3 Dill. 13; *Oliver v. Memphis & L. R. R. Co.*, 30 Ark. 128.

<sup>1</sup> *Chicago & N. Western Ry. Co. v. The Borough of Fort Howard and*

*another*, 21 Wis. 44; *Union Pac. R. R. Co. v. Lincoln Co.*, 2 Dill. 279; *Parmley v. St. Louis, Iron Mountain & Southern R. R. Co.*, 3 Dill. 13; *State Railroad Tax Cases*, 92 U. S. 613.

<sup>2</sup> *Chicago & N. Western Ry. Co. v. The Borough of Fort Howard and another*, 21 Wis. 44. But an allegation that the lands sought to be taxed are necessary to the proper operation of the road, is a sufficient averment of the user of the lands for that purpose, so as to show their exemption within a statutory provision exempting real estate "actually occupied in the exercise of its franchise, and necessary or in use in the proper operation of its road": *M., H. & O. R. R. Co. v. Marquette*, *supra*. It is held in Tennessee, that the act of that state of 1873, ch. 44, prohibiting the use of writs of *certiorari* and *supersedeas* to stay the collection of a tax, is not unconstitutional: *Louisville & Nashville R. R. Co. v. State*, 8 Heisk. 663, 19 Am. Ry. Rep. 107. Where the real purpose of a bill is to have certain taxes declared illegal, and an injunction is obtained as auxiliary to the decree, in an action on the injunction bond, attorney fees can not be recovered: *Carroll Co. v. Iowa R. R. Land Co.*, 53 Ia. 685; S. C. 6 N. W. Repr. 69, 21 Am. Ry. Rep. 173. The United States Courts have adopted the rule

**12. By the company to prevent multiplicity of suits.**—When there are several suits pending in court, wherein the same person is plaintiff, and the suits are all against the same defendant, involving a disputed question which is one and the same in all the suits, the court, if it possesses equity powers, may enjoin the prosecution of all but one, until the principle involved can be settled at law.<sup>1</sup> Such, too, is the case if the suits be for penalties claimed under a statute.<sup>2</sup> And if the court wherein the several suits are pending has not equity powers, then a court of original equity jurisdiction may grant the injunction.<sup>3</sup>

**13. By the company to prevent the commission of a crime.**—As an injunction will not be granted to restrain the commission of a crime, therefore one will not be allowed to restrain the former owner of a right of way from using violence to prevent a railroad company from exercising its rights in building its road within the prescribed limits of its right of way, when legally procured by the means prescribed by the statute. The courts have full power to punish crimes, or to prevent their commission, by imprisoning offenders or by binding them to keep the peace; but the civil process of injunction will not lie in such cases. The refusal of such former owner to accept the price does not alter the case; for when the company have assessed, and deposited the money where the law requires, its right is complete over the *locus in quo*, and it must both exercise and protect it as others do them.<sup>4</sup>

**14. By the company to prevent infringement of its franchises.**—An injunction will not be granted to restrain the laying of a pipe for transporting oil, without authority, on the bottom of a navigable river, on land belonging to the state, and underneath a draw-bridge of complainant, or over complainant's track, under and attached to a viaduct at a street crossing, where the pipe has

that no injunction will be granted unless that portion of the tax appearing to be due has been paid or tendered: *State Railroad Tax Cases*, 92 U. S. (2 Otto), 575; *Union Pac. R. R. Co. v. Lincoln Co.*, 2 Dill. 279; *Mobile & Ohio R. R. Co. v. Moseley*, 52 Miss. 127. See *Pelton v. Natl. Bank*, 101 U. S. 143; *Cummings v. Same*, *Id.* 153.

<sup>1</sup> *Third Avenue R. R. Co. v. Mayor & Aldermen of N. York City*, 54 N. Y. (9 Sickels), 159.

<sup>2</sup> *Third Avenue R. R. Co. v. Mayor & Aldermen of New York City*, *supra*.

<sup>3</sup> *Third Avenue R. R. Co. v. The Mayor & Aldermen of New York City*, *supra*.

<sup>4</sup> *Montgomery & West Point R. R. Co. v. Walton*, 14 Ala. 207.

been laid before the application for the injunction.<sup>1</sup> And in such case, where the complainant's franchise of carrying oil is not exclusive, such acts are not in contravention thereof, especially where it appears that the defendants intend to transport their own oil 'only.'<sup>2</sup> Irreparable injury should be shown to justify the granting of the injunction.<sup>3</sup>

**15. By the company to restrain transfer of railroad grant lands.**—An injunction will not be granted to restrain the doing of an act by the executive department of a state in its official capacity, whether it proceeds from error of judgment or misapprehension of duty. This rule applies both to merely ministerial acts, and to those involving the exercise of a discretion, and whether it arises out of the constitution or a legislative enactment.<sup>4</sup> Thus where it is claimed that railroad grant lands, the legal title to which is in the state, equitably belong to the plaintiff, upon the payment of certain claims for construction, and that the governor in his official capacity is about to sell and convey the same, such transfer will not be restrained.<sup>5</sup> Nor in such case will the court retain jurisdiction as to the other defendants, contractors for the construction of a railroad over such granted lands, against whom the plaintiff has no cause of action, but seeks auxiliary relief (an accounting as to their claims for such construction) in aid of his demand against the state, upon which the court can make no adjudication.<sup>6</sup>

**16. By railway receiver to protect his rights as such.**—When a receiver has been appointed for an insolvent railroad corporation, and an order of sequestration is made, placing the road, property, rights and credits of the company in his hands, subject to the court, it is for the benefit of all concerned, and one or more individual creditors will not thereafter be permitted to enforce their judgments or prosecute judicial proceedings against the company, or against individual corporators thereof, but will be restrained by injunction from so doing, on proper application

<sup>1</sup> *United N. J. R. R. & Canal Co. v. Standard Oil Co.*, 33 N. J. Ch. 123; S. C. 1 Am. & Eng. R. R. Cas. 33; *Central R. R. Co. of N. J. v. Same*, *Id.* 127, S. C. 1 Am. & Eng. R. R. Cas. 36.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Western R. R. Co. of Minn. v. De*

*Graff*, 27 Minn. 1; S. C. 6 N. W. Repr. 341, 21 Am. Ry. Rep. 419.

<sup>5</sup> *W. R. R. Co. v. DeGraff*, *supra*.

<sup>6</sup> *W. R. R. Co. v. DeGraff*, *supra*. Ch. 201, Sp. Laws of 1877, of Minnesota, do not authorize such retention of the action: *Ibid.*

of such receiver, to the end that all the assets of the company shall be subjected and distributed by the court to the payment of the claims, *pro rata*, of all creditors alike, subject only to such preferences, priority or liens as the court shall find to be just and right, if any such there be.<sup>1</sup>

**17. By tax payer to prevent illegal issue of bonds to railroad company.**—Where the officers of a county, or other municipal corporation, are about to illegally create a liability, as for instance the making of an unauthorized subscription to the capital stock of a railroad, or other private corporation, or are about to issue bonds of the municipality to pay such unauthorized subscription, under such semblance of authority as may result in giving such bonds validity in the hands of innocent holders, equity will interpose and prevent it by injunction, on application of a tax payer of such municipality.<sup>2</sup>

**18. Against directory to prevent breach of trust.**—Railroad directors are trustees in law for the incorporators or stockholders, and as such will be enjoined, at the suit of a stockholder or stockholders, from committing an intended breach or abuse of their trust.<sup>3</sup> Thus where a newly elected directory are intending to get control of a judgment existing in favor of the company, with the design of improperly using the proceeds thereof, or of improper use of the judgment itself, equity, upon a proper case made, will interfere by injunction and prevent it.<sup>4</sup>

<sup>1</sup> Rankine v. Elliott, 16 N. Y. 377.

<sup>2</sup> Allison and others v. The Louisville, Harrod's Creek & Westport Ry. Co., 9 Bush (Ky.), 247; Daviess Co. Ct. v. Howard, 13 Bush, 101; Jackson Co. v. Brush, 77 Ill. 59; Wright v. Bishop, 88 Ill. 302, 21 Am. Ry. Rep. 301; Wellsborough v. N. Y. & Can. R. R. Co., 76 N. Y. 182; Lawson v. Schnellen, 33 Wis. 288; Wagner v. Meety, 69 Mo. 150; Concord v. Portsmouth Sav. Bank, 92 U. S. 625; Redd v. Henry Co., 31 Gratt. 695; Delaware Co. v. McClintock, 51 Ind. 325. The company is not a necessary party: Jager v. Doherty, 61 Ind. 528; Bittinger v. Bell, 65 Ind. 445. After the bonds are issued, no injunction will be

granted unless the municipality has a valid defense to them: Wilkinson v. City of Peru, 61 Ind. 1. The court will, in a proper case, decree the cancellation of bonds illegally issued: Springport v. Teutonia Sav. Bank, 75 N. Y. 397. And if illegal in the first place, a curative act of the legislature will not remedy the illegality, if passed after the inception of suit by such tax payer: Allison v. L. H. C. & W. Ry. Co., *supra*.

<sup>3</sup> Fisher v. Concord R. R. Co., 50 N. H. 200; Northern R. R. Co. v. Concord R. R. Co., *Id.* 175.

<sup>4</sup> Fisher v. Concord R. R. Co., 50 N. H. 200; Northern R. R. Co. v. Concord R. R. Co., *Id.* 175.

## CHAPTER XXXV.

### REMOVAL OF CAUSE TO THE UNITED STATES COURT FROM STATE COURT.

	Section.		Section.
When the cause may be removed on account of citizenship . . .	1	or by forces or officers of the United States . . . . .	4
When removable for prejudice or local influence . . . . .	2	Resident security not required for removal . . . . .	5
When removable for defense arising under the Constitution, treaties or laws of the United States . . .	3	Plaintiff may not prevent removal by reducing his demand . . .	6
Removal when sued for loss or damage caused by hostile forces,		When the proper application for removal is made, the state court can go no further . . .	7

#### 1. When a cause may be removed on account of citizenship.

—A suit against a railroad corporation, or other corporation, brought in a different state than that wherein the corporation is created, by a citizen or citizens of the state in which the suit is brought, may, if the amount in controversy is of the proper value (that is, if of over five hundred dollars, exclusive of costs), be removed by such railroad corporation to the circuit court of the United States, under the act of congress of 1789.<sup>1</sup>

<sup>1</sup> 1 U. S. Stat. at Large, 78; 1 Brightley's Dig. U. S. Laws, 128, Sec. 19; *Hatch v. The Chi., Rock Isl'd & Pacific R. R. Co.*, 6 Blatch. C. C. R., 105; S. C. 1 With's Corp. Cas. 79; *Case of The Sewing Machine Companies*, 18 Wall. 553, 575. The proviso of the 24th section of the act for the creation and regulation of incorporated companies in Ohio, as amended March 19, 1869 (66 Ohio L. 32), so far as it provides that leasing, purchasing or operating a railroad in that state, by a railroad company of another state, shall be regarded as a waiver of the right to remove cases to the United

States courts, was held unconstitutional in *Baltimore & Ohio R. R. Co. v. Cary*, 28 Ohio St. 208, 14 Am. Ry. Rep. 97. But the contrary is the ruling in Virginia: *Same v. Wightman*, 29 Gratt. 431, 17 Am. Ry. Rep. 351. Joint stock companies in New York, possessing the essential attributes of corporations, are, like other corporations, citizens of the state, and may sue and be sued in the Federal courts, and exercise the right of removal like other corporations: *Fargo v. Louisville, N. A. & C. Ry. Co.*, 6 Fed. Repr. 787; S. C. 1 Am. and Eng. R. R. Cas. 618.



Such removal is effected by the defendant by filing in the state court in said cause, at the time of entering his appearance therein, a petition for the removal of the cause into the next circuit court of the United States for that district, and by offering security for filing in said United States court, on the first day of the next term thereof, copies of all the files and records of such suit.<sup>1</sup>

If the matter in controversy be a money demand, then the sum demanded by the writ, or amount of damages claimed, is the amount in controversy; but if the action is for property, then the value of the thing in controversy is to be made apparent by the affidavit of the defendant, and such other proof, if any, as the court in its discretion may require.<sup>2</sup>

But to sustain the removal, not only the citizenship of each party, plaintiff and defendant, must be of the description required by the act of congress, but also each person of the parties, plaintiff and defendant, if more than one there be,<sup>3</sup> unless the objectionable ones are mere nominal defendants; \* or if the suit, "so far as it relates to the alien defendant, or non-resident defendant," is instituted and prosecuted for the purpose of restraining or enjoining such defendant; or if the suit is one which, so far as it respects such non-resident or alien defendant, can be finally determined without the presence of the other defendant or defendants as parties thereto; then such alien or non-resident defendant may remove the same, so far as regards his or her self, into the circuit court of the United States, at any time before the final hearing or trial of the cause, by filing in the state court a petition setting forth the existence of these or one of these facts, and such other facts as will bring the application within the other provisions of the statute in reference to the removal of causes on account of the citizenship of the parties.<sup>5</sup> But such removal as to

<sup>1</sup> Brightley's Dig. U. S. Laws, Vol. 1, 128, Sec. 19 and notes.

<sup>2</sup> *Hatch v. Chi., Rock Island & Pacific R. R. Co.*, 1 Withrow's Corp. Cases, 79; Same case, 6 Blatch. C. C. R. 105; Case of the Sewing Machine Companies, 18 Wall. 553, 575; Brightley's Dig. U. S. Laws, Vol. 1, p. 128, Sec. 19.

<sup>3</sup> *Wilson v. Blodget*, 4 McLean, 363; *Hubbard v. Northern R. R. Co.*, 25 Vt. 715; *Welch v. Tennent*, 4 Cal. 203;

*Walsh v. Memphis, C. & N. W. R. R. Co.*, 2 McCrary, 156; S. C. 6 Fed. Repr. 797, 1 Am. and Eng. R. R. Cas. 628.

<sup>4</sup> *Hatch v. The Chicago, Rock Island & Pacific R. R. Co.*, 6 Blatch. C. C. R. 105; S. C. 1st With's Corporation Cas. 79; *Hazard v. Durant*, 9 R. I. 602.

<sup>5</sup> Case of the Sewing Machine Companies, 18 Wall. 553, 578.

the non-resident or alien defendant or defendants, will not prejudice or take away the right of the plaintiff to proceed, at the same time, in the state court, with the suit, as against the remaining defendant or defendants, if he shall elect so to do.<sup>1</sup>

When corporations of different states have become consolidated, and one of the constituent corporations is sued in the courts of the state creating it, by its changed name, by a citizen or corporation of the same state, another of the constituent corporations, citizen of another state, can not remove the cause to the federal courts.<sup>2</sup> If a foreign corporation be adopted by a state, it then becomes a domestic corporation. So, a consolidated corporation, chartered by several states, is considered a domestic corporation of each, in questions of removal.<sup>3</sup>

If a corporation be a party, it is in law a person, and it is not now required, as formerly, that its members individually shall be of the capacity to sue or be sued in the federal courts.<sup>4</sup>

The joinder of an officer of the company, who is a citizen of the state wherein the suit is brought, as a defendant in such suit, will not prevent the removal into the United States court, if no claim or relief be claimed as against such officer personally, or other than that which is claimed against the company. In such case, the officer will be regarded and treated by the court, on the application for removal, as merely a nominal defendant.<sup>5</sup>

A suit against such corporation by its corporate name, is regarded in law as a suit against citizens of the state wherein and by which it is created. The legal presumption is that its members are citizens of such state. No averment or evidence is admissible to the contrary; and it follows, therefore, that for the jurisdictional purposes of the United States circuit courts, these suits, so far as they are suits against the company, are suits against citizens of the state wherein, and by which, the company is created. Nothing done by the company in reference to the place or manner of transacting its business, and not even a statute of

<sup>1</sup> Case of the Sewing Machine Companies, 18 Wall. 553, 578, 579; 14 U. S. Stat. at Large, 306.

<sup>2</sup> Chicago & Western Ind. R. R. Co. v. L. S. & M. S. Ry. Co., 5 Fed. Repr. 19; S. C. 1 Am. and Eng. R. R. Cas. 627.

<sup>3</sup> Uphoff v. Chicago, St. L. & N. O.

R. R. Co., 5 Fed. Repr. 545; S. C. 1 Am. and Eng. R. R. Cas. 627, 628.

<sup>4</sup> Case of the Sewing Machine Companies, 18 Wall. 553, 574, 575.

<sup>5</sup> Hatch v. The Chi., Rock Isl'd & Pacific R. R. Co., 6 Blatch. C. C. R. 105; S. C. 1 With's Corp. Cas. 79.

another state allowing it to transact business therein, and annexing terms to such privilege, can deprive it of the rights and privileges of a corporation of the state wherein it is created.<sup>1</sup>

In an application for the removal of a suit at law from a state court to the circuit court of the United States, no other than legal interests in the suit can be considered in determining the question of jurisdiction, and the question of who are the real parties to the suit; and this is to be done from the records. The court can not go outside of the case to ascertain whether some person other than the real plaintiff has not an equitable interest in the cause of action.<sup>2</sup> The trustees, or survivor thereof, in a trust mortgage, are the real plaintiffs in a suit brought to enforce an interest growing out of such trust.<sup>3</sup> As the cause of action is in such trustee, the court looks to his citizenship in disposing of the question of jurisdiction, or of a right of removal of the suit, and not to the residence of the persons who are the beneficiaries of the subject-matter of litigation.<sup>4</sup>

And as a legislative act discharging or changing the trust from one or more trustees to others would be invalid for impairing the obligation of the mortgage contract, it can not be so changed without the consent of the *cestuis que trust*. The right would still remain with the original trustees, who are the proper parties to a suit involving the trust interests.<sup>5</sup>

The right to remove a cause from a state court to a United States court, under the twelfth section of the judiciary act, exists as well where the suit is on an assigned instrument as otherwise. The restriction of the eleventh section of that act does not apply to cases wherein the plaintiff is a citizen of the state in

<sup>1</sup> Hatch v. The Chicago, Rock Island & Pacific Railroad Co. and others, 6 Blatch. C. C. R. 105; S. C. 1 With. Am. Corp. Cases, 79, 85; Louisville, C. & C. R. R. Co. v. Letson, 2 How. 497; Marshall v. The Baltimore & Ohio R. R. Co., 16 How. 314; The Covington Drawbridge Co. v. Shepherd, 20 How. 232; Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286; Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270; Manf. Nat. Bank v. Baack and others, 8 Blatch. 137; S. C. 1 With. Am.

Corp. Cases, 93.

<sup>2</sup> Knapp v. Railroad Company, 20 Wall. 117, 122.

<sup>3</sup> Knapp v. Railroad Co., 20 Wall. 117, 123. And they will be regarded as such in a suit by them, on a question of removal thereof from a state to a United States court: *Ib.*

<sup>4</sup> Knapp v. Railroad Company, 20 Wall. 117, 124.

<sup>5</sup> Knapp v. Railroad Co., 20 Wall. 117, 122, 123.

which the suit is brought, and the defendant is a citizen of a different state.<sup>1</sup> And a condemnation proceeding may be removed to the United States court on account of citizenship.<sup>2</sup>

On the 3d of March, 1875, Congress passed an act entitled "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes." By the second section of this act, it is provided that any suit of a civil nature, at law or in equity, then pending or thereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when, in any such suit, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit into the circuit court of the United States for the proper district.

The process of removal provided in this act is, 1st. To file a petition in the state court, before or at the term at which the cause can be first tried, and before the trial thereof, for the removal of such suit into the circuit court of the United States, to be held in the district where such suit is pending, stating the grounds for removal. 2d. And make and file with such petition a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by said circuit court in case said court holds that the suit is wrongfully or improperly removed thereto; and also for there appearing and entering special bail in such suit,

<sup>1</sup> *Bushnell v. Kennedy*, 9 Wall. 387;  
*Ayres v. The Western R. R. Co.*, 45  
N. Y. 260.

<sup>2</sup> *Boom Co. v. Patterson*, 98 U. S.  
403.

if special bail was originally requisite therein. This having been done, the state court is to accept the petition and bond, and proceed no further in the cause. The copy must then be entered into the said circuit court of the United States on or before the first day of the then next term, together with the appearance thereto of the party obtaining the removal, and the cause is then to proceed in the same manner as if originally commenced in said United States court.<sup>1</sup> If, however, from the time of removal there be less than twenty days intervening before the next term, then the entering the copy into the United States court, and appearance of the party, must be within twenty days from the date of the removal.

If the suit be a monied action, then the sum claimed in the declaration or petition of plaintiff is evidence of the amount in controversy, and no additional proof thereof is required; but if for property, then the value is to be shown by affidavit, or other evidence satisfactory to the court.

In a recent case this statute has received a partial exposition by the Supreme Court of the United States. As to the first clause of the second section, it is held the cause may be removed where the controversy is between citizens of different states, irrespective of the question who are the actual plaintiffs and defendants in the suit. The matter in dispute must first be determined, and the *status* of the parties determined with reference to that alone. In this respect the new law differs from the old, for under that the pleadings only were looked to to ascertain the parties.<sup>2</sup> As to the second clause, the Supreme Court reserve their opinion, no question on it arising in that case. In cases pending in state courts at the time of the passage of the act, an application for removal made at the first term thereafter is in apt time.<sup>3</sup> Upon the question whether the application is made before trial, it is held that the trial must be actually in progress in the orderly course of proceeding, in order to bar the right of removal.<sup>4</sup> A party entitled to a removal who is denied such

<sup>1</sup> Act of Cong. 3d March, 1875, secs. 1 and 2; Laws of 2d session 43 Cong., 470, 471.

<sup>2</sup> Meyer v. Construction Co., 100 U. S. 457; S. C. 21 Am. Ry. Rep. 465.

See this case also for form of petition for removal, *held* good.

<sup>3</sup> Meyer v. Const. Co., *supra*.

<sup>4</sup> Meyer v. Const. Co., *supra*.

right and forced to trial, loses none of his rights by defending the action.<sup>1</sup>

**2. When removable for prejudice or local influence.**—By the act of Congress of 2d of March, 1867, any suit brought in a state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen or corporation of another state, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, may be removed into the circuit court of the United States by such citizen or corporation of another state, whether plaintiff or defendant, by making and filing in such state court an affidavit, stating that such citizen or corporation has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such state court, and by filing with such affidavit a petition in such state court, at any time before the final hearing or trial of such suit, praying for the removal thereof into the next circuit court of the United States to be held in the district where the suit is pending, and by offering good and sufficient security for entering in such United States court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit.<sup>2</sup>

Under this act of Congress, a party, if the case be otherwise of a proper character for removal, may remove his suit, whether he be plaintiff or defendant, into the United States court, at any time before the final hearing or trial; and this, too, although the party seeking to remove the same be plaintiff, and has voluntarily elected to commence his action in the court of the state.<sup>3</sup> And the same rule applies to actions commenced before the enactment of the amendatory act of 1867, if such actions be still pending subsequently to the passage of said act.<sup>4</sup>

When a right of action exists in a party, whether at common law or given by statute, of a character otherwise capable of being brought in, or removed to, a court of the United States, no state can make any valid law requiring the same to be prosecuted exclusively in the court or courts of the state.<sup>5</sup> Nor

<sup>1</sup> *Meyer v. Const. Co.; Ins. Co. v. Dunn*, 19 Wall. 214.

<sup>2</sup> 14 U. States Statutes at Large, 558; Brightley's Dig. L. U. S., Vol. 2, 116, sec. 17.

<sup>3</sup> *Chi. & N.W. Ry. Co. v. Whitton*,

13 Wall. 270.

<sup>4</sup> *Chi. & N. W. Ry. Co. v. Whitton*, 13 Wall. 270.

<sup>5</sup> *Chi. & N. W. Ry. Co. v. Whitton*, 13 Wall. 270.

does it matter to the contrary that the right of action be conferred by a statute of the state, and that the statute confines the right to prosecute the same in terms to the courts of such state. In either case such statutory requirement is invalid, as an invasion of the rightful and constitutional authority of the national government.<sup>1</sup>

**3. When removable for defense arising under the Constitution, treaties or laws of United States.**—When a suit or action is commenced in a state court by any person, wheresoever resident, against a railroad corporation organized under the laws of the United States, for any liability or alleged liability of such corporation, or any member thereof as such member, such corporation, or officer or member thereof, as the case may be, may have such suit or action, whether the same be at law or in equity, removed from the court wherein it may be pending to the circuit court of the United States, or proper United States court, by filing a petition for such removal, verified by oath, either before or after joining issue therein, claiming to have a defense arising under or by virtue of the Constitution of the United States, or any treaty or law of the United States, and offering good security for entering into such United States court, on the first day of its next session, copies of all process, pleadings, depositions, testimony and other proceedings in such suit.<sup>2</sup>

**4. Removal when sued for loss or damage caused by hostile forces, or by forces, or officers thereof, of United States.**—Under the act of Congress of January 22, 1869, amendatory of the act of March 3, 1863, when any suit or action at law, or prosecution, civil or criminal, commenced in any state court against the owner or owners of any railway, or against any railroad corporation, engaged in the transportation, as common carriers, of goods, wares or merchandise, for any loss or damage which may have happened to any goods, wares or merchandise delivered to such owner or corporation for transportation, while engaged as common carriers, by the acts of those engaged in hostility to the

<sup>1</sup>Chi. & N. W. Ry. Co. v. Whitton, 13 Wall. 270.

<sup>2</sup>15th Vol. U. S. Statutes at Large, 227. D. C. 1869, Div. I, II, S. Vol. 2.

created by the United States, is a suit arising under the laws of the United States: Union Pacific R. R. Co. v. McCumb, 12 Blatch. 510; S. C. 1 Fed.

government of the United States during the late rebellion, or loss or damage occasioned by any forces of the United States, or officers in command of such forces, if the defendant or defendants in such action or prosecution file a sworn petition, stating the facts, at the time of entering appearance in said cause or prosecution, to remove the same for trial to the next circuit court of the United States for the district wherein the suit is pending, and offer good and sufficient surety for filing in such United States court, on the first day of the next term thereof, copies of the process and other proceedings against such defendant, and for appearance in said United States court, and entering special bail, if bail was originally required therein, then, and in such case, the defendant or defendants will be entitled to have such cause or prosecution removed to such circuit court of the United States for trial, and the state court must, in the exercise of a reasonable discretion, accept such security; and thereafter it can proceed no farther therein.<sup>1</sup>

**5. Resident security not required for removal.**—Resident security is not required of persons litigating in the United States courts. In order to litigate in the federal courts a party must, in most cases, be non-resident of the state, and to exact of such parties resident security would be great injustice.<sup>2</sup> Such being the general doctrine held upon the subject, it follows that a non-resident defendant, applying to remove a cause into the federal court, may not be required to give resident security in the bond for entering the papers and an appearance in the United States court, to entitle him to the order of removal.

The court may exercise a reasonable discretion as to the sufficiency of the security in point of responsibility; but such discretion, if the order is denied, may be reviewed by the United States court, on application thereto for an order of removal, or upon the question of exercising jurisdiction, if the papers be filed therein without an order, when the order is denied.

When the proper application and case is made to the state court for removal, under the enactments of congress, no action of the state court thereon can either confer or take away the right of removal. The discretion of the state court, in passing

<sup>1</sup> U. States Statutes at Large, Vol. 12, 756; Brightley's Dig. U. S. Laws, Vol. 2, 112, sec. 6.

<sup>2</sup> *Souter v. LaCrosse R. R. Co.*, Woolworth's C. C. R. 80.



on its sufficiency and as to the security, is a legal one. No actual order for removal is necessary; but as matter of practice it is preferable to have an order. The right of removal is not dependent on such order. If it were, say the court in *Hatch v. The Chicago, Rock Island & Pacific Rail Road Company*, then "the refusal of the state court, in a proper case, to make such an order, would make it impossible for the defendant to secure the removal, except by carrying the suit through the state tribunals, and then carrying it from the highest state tribunal to the Supreme Court of the United States, under the 25th section of the judiciary act of 1789."<sup>1</sup> When the right to remove a cause is, by the proper application, made complete, then the power of the state court over the cause is at an end; and whether an order of removal be made or not, the defendant can perfect the removal by entering in the United States court, at the proper time, copies of the necessary papers, and his appearance, and giving bail, if bail is required; and the cause will thereupon proceed in the United States court.<sup>2</sup>

**6. Plaintiff may not prevent removal by reducing his demand.**—On filing in the state court the requisite application and bond, or tendering the same, and within the proper time, the right of removal is complete, and the plaintiff can not then prevent the removal by reducing the amount of his demand, by an amendment of his petition, bill or declaration, or by any other proceeding.<sup>3</sup> Any further proceeding in the state court will be not only erroneous, but *coram non judice*, the jurisdiction of the cause having vested now in the United States court.<sup>4</sup>

**7. When the proper application for removal is made, the state court can go no further.**—When the proper application has been made under either of the acts of Congress, as the case may be, for the removal of an action or suit from a state court into the proper court of the United States, then the only remaining power of the state court over the same is for the exercise of a wholesome dis-

<sup>1</sup> *Hatch v. The Chicago, Rock Island & Pacific R. R. Co.*, 6 Blatch. C. C. R. 105, 117, 118; S. C. 1 Withrow's Corp. Cas. 79; *Gordon v. Longest*, 16 Pet. 97, 104.

<sup>2</sup> *Hatch v. Chicago, Rock Island & Pacific R. R. Co.*, 6 Blatch. C. C. R.

105.

<sup>3</sup> *Kanouse v. Martin*, 15 How. 198; 1 Brightley's Dig. U. S. L., 128, note (e.)

<sup>4</sup> *Gordon v. Longest*, 16 Pet. 97; 1 Brightley's Dig. U. S. L., 128, note (e.)

cretion and judgment as to the sufficiency of the security offered.<sup>1</sup> No actual order of removal is necessary to effect a removal; but by operation of law the case becomes transferred into the United States court and out of the state court at once, and the jurisdiction of the state court over the cause is gone,<sup>2</sup> except, as above stated, for the exercise of a wholesome discretion in reference to the sufficiency of the security offered for entering the proceedings in the United States court. The proceeding is merely one way, or a method, of bringing an action or suit in the United States court. The state court, after the proper papers are presented to it for removal, whether it be under the original judiciary act on account of citizenship, or in a proper case under any one of the subsequent acts of congress, can go no further.<sup>3</sup> It can neither make an order changing the character or amount of the suit, so as to cut off or defeat the removal of the same, nor indeed can it order the same to be dismissed, even at the instance of the plaintiff; for the cause has ceased to be *coram judice* before the court. It can proceed no further, either in one direction or another. We are aware that in a note to volume one of Mr. Brightley's Digest of United States Laws, page 128, note (b), it is said, "The complainant, however, may, it seems, dismiss his bill: *Matthews v. Lyall*, 6 McLean, 13. See *Illius v. New York and New Haven Railroad Company*, 3 Kern. (13 N. Y.), 597." But on a careful reference to those cases, it will be seen that neither of them bear out the learned author in the position in that respect assumed by him. The case cited from 6 McLean is very brief and unsatisfactory, going no further than to reiterate the general principle that the plaintiff may dismiss his suit in either court; not, however, assuming that he may do so *after* the proper application for removal is made. Wherever the suit may be, the plaintiff of course may dismiss it, but not in a court where it has ceased to be.

<sup>1</sup> *Hatch v. The Chi., Rock Isl'd & P. R. R. Co.*, 6 Blatch. C. C. R. 105; *S. C. 1 With's Corp. Cas.* 79; *Gordon v. Longest*, 16 Pet. 97, 104; *Hughes v. Mine Hill & Schuylkill Haven R. R. Co.*, 30 Penn. St. 517; *Fisk v. Union Pacific R. R. Co.*, 10 Abbott's Pr. (N. S.), 457.

<sup>2</sup> *Hatch v. Chicago, Rock Isl'd &*

*P. R. R. Co.*, 6 Blatch. C. C. R. 105; *S. C. 1 With's Corp. Cas.* 79; *Gordon v. Longest*, 16 Pet. 97, 104.

<sup>3</sup> *Hatch v. Chi., Rock Isl'd & Pacific R. R. Co.*, 6 Blatch. C. C. R. 105; *S. C. 1 With's Corp. Cas.* 79; *Gordon v. Longest*, 16 Pet. 97, 104; 2 Bright. Dig. U. S. L., 116, Secs. 17, 18; 14 U. S. Stat. at Large, 558.

The case cited from 3 Kern. (13 N. Y.), by Mr. Brightley, does not touch the subject at all. The defendant, a corporation organized in Connecticut, was sued in the state court in New York by a citizen of New York. The defendant removed the case to the United States circuit court under the 12th Sec. of the judiciary act; that is, on the ground of citizenship. The plaintiff appealed from the order of removal, and the appellate court dismissed plaintiff's appeal on defendant's motion, on the ground that the order of removal was not such order or judgment as determined the action, but on the contrary but carried it to a different tribunal for trial; that if that tribunal (the United States court) retained the jurisdiction, then the case would proceed to trial on the merits therein; and if, on the other hand, that court should hold the removal to have been wrongful, then the cause would be ordered back to the state court for final hearing, and that in such case the order of removal in the state court would be rescinded by that court, which would then resume jurisdiction of the cause, and proceed with it to final determination. There is nothing said or done in the whole case about the right of the plaintiff to dismiss his suit in the state court when application by the defendant is made to remove the same to the federal tribunal.

It is evident, therefore, that there is nothing in these two cases referred to in Brightley to justify the doctrine asserted by him in said note.

When a cause is removed from the state to the United States court, for reasons within the act of Congress, as alleged, and before the removal is perfected the paper files of the cause are burned, yet if the parties thereto admit, by writing filed in the United States court, the regularity and sufficiency of such removal—as, for instance, by suggesting the existence and removal thereof, and loss of the files by fire, and ask leave to, and do actually, file substitutes of the declaration and pleadings in such cause in the United States court—then both the cause and the parties are regularly in such court for trial, and the jurisdiction has so attached that the sufficiency of the original proceedings for removal, or the truth of the grounds thereof, will no longer be open to inquiry.<sup>1</sup>

<sup>1</sup> *Pittsburg, C. & St. L. Ry. Co. v. Ramsey*, 22 Wall. 322.

## CHAPTER XXXVI.

### MECHANIC'S LIENS.

	Section		Section
Are creatures of the statute . . .	1	Legislative power to abolish or	
Law of, as applicable to railroads . .	2	modify the lien . . . . .	5
Benefit thereof may be waived . . .	3	Priority . . . . .	6
Assignability of such liens . . .	4		

**1. Are creatures of the statute.**—Mechanic's liens are purely the creatures of the statute, in the American states.<sup>1</sup> Though well known to the civil law,<sup>2</sup> they were unknown to the common law and to chancery in the jurisprudence of this country, and are in all things governed by the statutes of the several states wherein they exist.<sup>3</sup>

The ordinary enactments giving mechanics liens upon buildings and improvements erected or made by them, are not construed to apply by implication to railroads, or railroad structures, as bridges, culverts, and other works appertaining to their construction.<sup>4</sup>

But although the creatures of, and governed in their force and effect by, the statute, and although unknown to chancery as formerly administered, for the reason that formerly they did not exist, but are of modern date, yet their enforcement ordinarily involves the exercise of the equitable powers of the courts, even though the proceedings be conducted under the statute in form of law proceedings, and if not by the statute otherwise required, must be in chancery, and according to the principles of equity.<sup>5</sup>

<sup>1</sup> *Canal Co. v. Gordon*, 6 Wall. 561; *Spencer v. Barnett*, 35 N. Y. 94; *McCoy v. Quick*, 30 Wis. 521; *Davis v. Farr*, 13 Penn. St. 167; *Ayres v. Revere*, 1 Dutch. (N. J.), 474.

<sup>2</sup> Domat, secs. 1742, 1744.

<sup>3</sup> *Canal Co. v. Gordon*, 6 Wall. 561; *Spencer v. Barnett*, 35 N. Y. 94; *McCoy*

*v. Quick*, 30 Wis. 521; *Ayres v. Revere*, 1 Dutch. 474.

<sup>4</sup> *Dunn v. North Mo. R. R. Co.*, 24 Mo. 493. But see *Botsford v. New Haven, Middletown & Willimantic R. Co.*, 41 Conn. 454, 7 Am. Ry. Rep. 153.

<sup>5</sup> *Hamilton v. Dunn*, 22 Ill. 259; *Ro-*

2. **Law of, as applicable to railroads.**—Under the general railroad act of New York (Laws of 1850, chapter 140, sec. 12), a claim is given against railroad corporations for the indebtedness of a contractor to any laborer, for thirty or less number of days' labor performed in the construction of a road of any such corporation.<sup>1</sup> But to fix the claim, notice thereof, within a time limited by said statute, must be given to the company, specifying the number of days' labor for which claim is made, and the time when the labor was performed.<sup>2</sup>

It is held by the courts of said state that the terms "laborer" and "labor" are in said act used in the ordinary sense; that this provision was intended for the benefit of the common laborer, in the popular meaning of the term—one who earns his daily bread by his toil—and that it is not to be extended to one who contracts for and furnishes the labor and services of others, or contracts for and furnishes teams for work, whether with or without his own services or services of others to take charge of the same; nor to persons using mechanical appliances.<sup>3</sup> But when the lien is expressly given to the contractor, it not only inures to him as such, but the term "contractor" is sometimes construed to include all who contract to build or do the work, and therefore as applying alike to contractor and to sub-contractor.<sup>4</sup>

And so in the state of Georgia, under the constitutional and statutory provisions of 1869, of that state, giving mechanics

rer on Judicial Sales, sec. 170; *Rose v. Persse & B. Paper Wks.*, 29 Conn. 256; *Goodman v. White*, 26 Conn. 317; *McInerney v. Reed*, 23 Iowa, 410.

<sup>1</sup> *Balch v. The New York & Oswego Midland R. R. Co.*, 46 N. Y. (1 Sickels), 521.

<sup>2</sup> *Balch v. The New York & Oswego Midland R. R. Co.*, 46 N. Y. 521.

<sup>3</sup> *Balch v. The New York & Oswego Midland R. R. Co.*, 46 N. Y. (1 Sickels), 521, 524. Under the Iowa statute, giving a lien to laborers generally, under a contract with the owner or agent, a day laborer upon a railroad, under verbal contract to a sub-contractor, is entitled to his lien: *Mornan v. Car-*

*roll*, 35 Ia. 22, 5 Am. Ry. Rep. 193.

<sup>4</sup> *Kent v. N. York Cent. R. R. Co.*, 12 N. Y. 628; *Peters v. St. Louis & Iron Mountain R. R. Co.*, 24 Mo. 586. But this definition, when so extended, is given in reference to the connection and terms in which the word "contractor" is used, as "any contractor," or "a contractor," whereby the term is so enlarged as to include one who contracts with a contractor about the subject-matter of his job. *Id.* He is an "original contractor," within the meaning of a statute, who contracts with the president, acting on behalf of the railroad company: *Hearne v. Chillicothe & Brunswick R. R. Co.*, 53 Mo. 324, 12 Am. Ry. Rep. 349.

and laborers liens for labor performed and materials furnished, it is held that contractors, as such, are not entitled to the benefit of the lien; that such statutory provisions of the act of 1869 are intended for the security of laborers for their own personal labor, and mechanics for their own personal labor, as such, and for materials furnished as such by them, but not to either the one or the other of them as contractors to perform a job, although they be mechanics or laborers by vocation;<sup>1</sup> and that therefore such claims as a contractor's can not be set up as a lien under said constitutional and statutory provisions of 1869, in postponement of the bonds of the company given to aid in the construction of the road; and more especially so when the contractors claiming such lien had themselves contracted for and received portions of the bonds on account of their contract of construction, and themselves placed such bonds in the market, whence they came into the hands of persons for value, before maturity.<sup>2</sup> But by a later enactment of said state, a lien is expressly given to contractors for the construction of railroads.<sup>3</sup>

The attaching of a mechanic's lien to a depot building and the ground on which it is erected, will not be precluded for the reason that the track of the railroad terminates on the same premises. Though the railroad is an entirety, that part occupied by the depot building is subject to the mechanic's lien; as clearly so as if the lien had been created by a mortgage of the same ground and depot house, to procure the erection of the latter.<sup>4</sup> If there be several judgments against the same property, the court will apportion the proceeds amongst the parties according to their rights.<sup>5</sup>

But although a mechanic's lien may attach to a depot house, and to the grounds on which the house is erected, within the limit of the one acre of land to which it is restricted by the stat-

<sup>1</sup> Savannah & Charleston R. R. Co. v. Callahan, 49 Geo. 506.

<sup>2</sup> Savannah & Charleston R. R. Co. v. Callahan, 49 Geo. 506.

<sup>3</sup> Code of Georgia of 1873, sec. 1979.

<sup>4</sup> Hill and another v. La Crosse & Milw. R. R. Co., 11 Wis. 214; McIlvain v. Hestonville & Mantua R. R. Co., 5 Phila. 13. By the contract for its erection, the depot house and

grounds are treated as an entirety, and are severed from the mass of the road, in legal effect; but not so as to the general work of construction of a particular section of the road; in the latter case the lien is to be applied for upon the whole: Cox v. Western Pacific R. R. Co., 44 Cal. 18.

<sup>5</sup> Hill and another v. La Crosse & Milw. R. R. Co., 11 Wis. 214.

ute, yet a railroad bridge is not the subject of a mechanic's lien under the ordinary mechanic's lien law of Wisconsin.<sup>1</sup> It is there held that a bridge is not a building, within the true meaning and popular sense of the statute, which gives liens to mechanics, under certain circumstances, upon "any dwelling house or other building."<sup>2</sup>

If, at the request of a railroad corporation, a person pay off and discharge, out of his own funds, an indebtedness existing against the company, an action for the amount so paid will lie in his favor against the company, as for money laid out and expended at its request and for its benefit.<sup>3</sup> But although the claims thus paid off be of such a character as, under the statute, will confer and support a mechanic's lien against the railroad, in the hands of, or in behalf of, the original claimants, yet such right of lien does not follow and attach to such claims, in behalf of the person so making payment for the company. He stands towards the company in the light merely of an ordinary creditor, there being no law giving liens to those who advance money for debtors to satisfy debts which confer on the creditor a right to statutory liens.<sup>4</sup> If, however, such liens be in law assignable, and the debts be assigned instead of being extinguished by payment, the effect might be different.

In a proceeding to establish and enforce a mechanic's lien for work or materials done or furnished to a sub-contractor of a railroad company, the contractor is a necessary party to the proceeding, and if not made a party the proceeding is demurrable.<sup>5</sup> If, however, the railroad company proceed to trial without objection in that respect, and judgment go against it on the merits, the mere omission to make the contractor a party will not avail the defendant in the judgment lien as matter of error. The objection then comes too late, and in the wrong shape. Under the statute of Wisconsin it should have been taken by demurrer or answer.<sup>6</sup>

Certainty to a common intent is all that is required in the al-

<sup>1</sup> *La Crosse & Mil. R. R. Co. v. Vanderpool*, 11 Wis. 119.

<sup>2</sup> *La Crosse & Mil. R. R. Co. v. Vanderpool*, 11 Wis. 119.

<sup>3</sup> *Cairo & Vincennes R. R. Co. v. Fackney*, 78 Ill. 116.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Carney v. The La Crosse & Mil. R. R. Co.*, 15 Wis. 503; *Clark v. Brown*, 22 Mo. 140.

<sup>6</sup> *Carney v. The La Crosse & Mil. R. R. Co.*, 15 Wis. 503, 508.

legations of the petition;<sup>1</sup> and where the petition stated that the work and materials were done and furnished "within a year past," and the bill of particulars gave the amount and kind of labor and materials, with the price, and stated that they were done and provided "up to the 21st of November last," and by contract, it was held sufficient.<sup>2</sup>

**3. Benefit thereof may be waived.**—Although the character of the transaction be such, between the owner of the property and the builder or contractor, that a mechanic's lien may vest in such builder or contractor, if there is no understanding to the contrary, yet the builder or contractor may, in the contract which is the basis of his undertaking, waive his right to the lien, and an agreement so to do will be binding as between themselves.<sup>3</sup> Moreover, such waiver will also be binding as against a sub-contractor, if the latter enter into the undertaking with knowledge thereof; for the rights of the sub-contractor can be no greater than those of his principal.<sup>4</sup> And knowledge of the sub-contractor that there is a written contract between the original parties will charge him with knowledge of the terms thereof in that respect, as it is sufficient notice to put him upon inquiry.<sup>5</sup>

**4. Assignability of the lien.**—In some instances it has been held that such liens are assignable by assignment of the debt, and are carried thus to the assignee of the debt, with the right of action to enforce the same in his own name.<sup>6</sup> In other cases it is decided that they are in the nature of a personal privilege, and are not so assignable as to entitle the assignee to the benefit of the same, in an action in his own name, although the debt be legally assigned to him; that his only remedy is a personal action and ordinary judgment against the debtor, without lien other than the usual judgment lien which follows in course upon

<sup>1</sup> *Williamson v. New Jersey Southern R. R. Co.*, 28 N. J. Ch. 277, 14 Am. Ry. Rep. 34.

<sup>2</sup> *Williamson v. N. J. S. R. R. Co.*, *supra*.

<sup>3</sup> *Bowen v. Aubrey*, 22 Cal. 566. But a statement in the contract that the company will pay the contractor out of a certain fund, will not vitiate the lien: *Meyer v. Construction Co.*, 100 U. S. 457, 21 Am. Ry. Rep. 465.

<sup>4</sup> *Bowen v. Aubrey*, 22 Cal. 566; *Benedict v. Danbury & Norwalk R. Co.*, 24 Conn. 320.

<sup>5</sup> *Bowen v. Aubrey*, 22 Cal. 566; *Benedict v. Danbury & Norwalk R. Co.*, 24 Conn. 320.

<sup>6</sup> *Iaeger v. Bossieux*, 15 Gratt. 83; *Tuttle v. Howe*, 14 Minn. 145; *Skyrme v. The Occidental Mill & M. Co.*, 8 Nev. 219.



judgment, if judgment be a lien in the tribunal where he recovers.<sup>1</sup> The latter ruling is the more prevalent one. Yet each are authority in the lower courts of the respective states where decided, until overruled by the supreme courts thereof.

But it does not follow that the assignee of the debt will not have a right to sue in the name of the assignor for both a judgment and the mechanic's lien, but for the use and benefit of himself. It has been held that such is his privilege.<sup>2</sup>

**5. Legislative power to abolish or modify the lien.**—Any legislation, the effect of which is to destroy or lessen the binding force of the lien after it has attached, or to destroy or diminish the right thereto of the mechanic after the contract is made, and he is bound to perform the job for the performance of which he has contracted, and by the performance of which the lien is in law to inure to him, is unconstitutional and void, as impairing the obligation of the contract; for where, by the law of the contract, a lien would inure under the contract if performed, then the law presumes that circumstance to have been considered by the mechanic as one of the inducements to entering into the contract, and must be so regarded.<sup>3</sup> If, after contracting under legal assurance of such lien as the result of his performance, the right to such result be taken away by law, leaving the party to look exclusively to the personal security or responsibility of the other party for his pay, and yet bound to perform the job, it is more purely an impairing of the obligation of the contract, and more injuriously so to the undertaker, than it would be if the contract be by law entirely annulled; for in the latter case he would no longer be bound to do the work. The effect of taking away the right to the lien on performance and leaving the mechanic still bound to do the work, is to have led him into a legislative trap.

If, however, the statute giving the lien be passed after the contract for the work is made, then it may be repealed, and the ex-

<sup>1</sup> *Dano v. The Mississippi, Ouachita & Red River R. R. Co.*, 27 Ark. 564; *Caldwell v. Lawrence*, 10 Wis. 331; *Fitzgerald v. The First Presb. Church*, 1 Mich. N. P. (1 Brown), 243; *Rollin v. Cross*, 45 N. Y. 766.

<sup>2</sup> *Palmer v. Merrill*, 6 Cush. 282; *Hallahan v. Herbert*, 11 Abb. N. Y. Practice Reps. (N. S.), 326.

<sup>3</sup> The great principle upon these conclusions as are here predicated, was decided and asserted in *Bronson v. Kinzie*, 1 How. 311; and though that is a case in no manner involving mechanic's liens, or the rights and liabilities of railroad corporations, yet it is one which applies to all parties litigant where parallel questions arise.

peetation of the lien, as respects that contract, may be thereby defeated; for in such case the expectation or assurance of a lien was not taken into consideration when making the contract. The repeal, even then, can only defeat the lien as to such work as has been done under the contract made before its enactment, and does not flow therefrom. If other work, independent of the contract, be undertaken and done during the existence of the lien law, or in view of it, then the right of lien as to the latter work will not be destroyed by the repeal; for the repealed law having entered into the transaction, remains enforceable to consummate the same.<sup>1</sup>

But the legislature may pass laws limiting the time in which the lien is enforceable, and the same, as other limitation laws, will be valid if a reasonably practicable time be allowed.<sup>2</sup> And so the remedy may be modified as to the means of enforcing the lien, provided such modification does not injuriously affect the contract itself, by impairing the same.<sup>3</sup> So, also, the lien may be postponed in law, in favor of subsequent purchasers and incumbrancers, for want of record notice thereof, if such be required, just as in case of deeds and other instruments, for not being recorded, in reference to landed property generally.<sup>4</sup>

**6. Priority.**—It is held in Iowa, under their mechanic's lien law, that a mortgage on after acquired property takes precedence of a mechanic's lien subsequently acquired; that the record of the mortgage is notice, and the lien becomes tantamount to a second mortgage.<sup>5</sup> In this case the mortgage was made to a trustee, upon all property then owned or thereafter to be acquired, to secure bonds agreed to be issued to a contractor in payment for constructing the road, and the liens were acquired before the issue of the bonds, and were for ties. This court also

<sup>1</sup> *Sullivan v. Brewster*, 1 E. D. Smith (N.Y.), 681; *Church v. Davis*, 9 Watts, 304.

<sup>2</sup> *Forcht v. Short*, 45 Mo. 377; *Balch v. New York & Oswego Midland R. Co.*, 46 N. Y. 521.

<sup>3</sup> *Paine v. Woodworth*, 15 Wis. 298.

<sup>4</sup> *Jackson v. Lamphire*, 3 Pet. 290; *McCracken v. Hayward*, 2 How. 613. Chap. 45 of the Laws of 1865 of Kansas, giving mechanic's liens upon railroads, was repealed by the revision of

1868: *Burgess v. Memphis, Carthage & N. W. R. R. Co.*, 18 Kans. 53, 15 Am. Ry. Rep. 181.

<sup>5</sup> *Neilson v. Iowa Eastern Ry. Co.*, 44 Iowa, 71; S. C. 8 Am. Ry. Rep. 82. But a mechanic's lien for work done under a contract takes precedence of any incumbrances subsequent to the commencement of the work: *Meyer v. Construction Co.*, 100 U. S. 457, 21 Am. Ry. Rep. 465.

held, that while a mortgage of property thereafter to be acquired might not take precedence of a lien accruing between the recording of the mortgage and the acquiring of the property, yet a mortgage given to secure a valid and existing contract would take precedence.<sup>1</sup> Further, that a mortgagee who has contracted to make advances or incur liabilities, may *tack* them to the mortgage, and thus secure himself upon the property, even though it be acquired after he has notice of subsequent incumbrances.<sup>2</sup> The purchasers of bonds issued under such a mortgage are not put to inquiry as to whether the bonds and mortgage were issued simultaneously, or whether liens have accrued in the *interim*.<sup>3</sup> It is held also, that Sec. 1855 of the Iowa Code of 1860, giving material-men a specific lien upon a building or erection in preference to prior liens, does not apply where the specific property is so incorporated with other mortgaged property that it can not be removed without a destruction of the whole; and a lien was allowed upon the road-bed subject to the mortgage, but not to any specific properties which could not be removed without injury.<sup>4</sup>

Where the property upon which the lien is sought to be enforced had been offered to be deeded to the railroad company upon condition that upon the erection of the buildings in question the land should become theirs, it was held, on a question of priority between the lien and a prior mortgage on subsequently acquired property, that the equitable title to the land did not vest until the performance of the condition, and therefore the lien took precedence of the mortgage.<sup>5</sup>

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Botsford v. New Haven, Middletown & Willimantic R. R. Co.*, 41 Conn. 454, 7 Am. Ry. Rep. 153.

## CHAPTER XXXVII.

### TRESPASS.

	Section.		Section.
Trespass lies against a railroad corporation . . . . .	1	Trespass of servant of company . . . . .	4
Delay in perfecting right of way, after possession, may amount to trespass . . . . .	2	Actions by a reversioner . . . . .	5
Trespass by intrusion on lands outside right of way . . . . .	3	Trespass lies in favor of the company . . . . .	6
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**1. Trespass lies against a railroad corporation.**—The earlier cases hold that trespass will not lie against a corporation aggregate, for the technical reason that in that action a *capias* was the only process: and it being for the arrest of the body of the defendant, was, as against a mere legal entity, impracticable. But this objection has gradually yielded, as process has varied and corporations became more numerous, and the objections which were in the way of actions for torts against these bodies have been swept away by time and legal process, until now corporations aggregate are liable to all manner of civil actions to which private individuals are amenable.<sup>1</sup>

A trespass is an injury against the owner of the property at the time of its commission; hence an action of trespass will only lie in such owner's name. The right of action does not pass with the premises to a subsequent purchaser or grantee.<sup>2</sup>

<sup>1</sup> *Brokaw v. The New Jersey Railroad & Transportation Co.* and another, 3 Vroom (N. J.), 328; *Vance v. The Erie Ry. Co.*, 3 Vroom (N. J.), 334; *Tinsman v. The Belvidere Delaware R. R. Co.*, 1 Dutch. 255; *New York & New Haven R. R. Co. v. Schuyler*, 38 Barb. 534; Same case, 7 Tiffany, 30; *Phila., W. & B. R. R. Co. v. Quigley*, 21 How. 202. So in England: *Goff v. Great Northern Ry. Co.*, 3 El. & El. 672; *Eastern Co's Ry.*

*Co. v. Broom*, 6 Exch. 314; *Chilton v. London & Croydon Ry. Co.*, 16 M. & W. 212; *Whitfield v. S.E. Railway Co.*, El., B. & E. 115; *Green v. The London Genl. Omnibus Co.*, 7 C. B. (N. S.), 290.

<sup>2</sup> *Central R. R. Co. v. Hetfield*, 5 Dutch. 206; *Harrington v. St. Paul & Sioux City R. R. Co.*, 17 Minn. 215; *Ills. Cent. R. R. Co. v. Allen*, 39 Ill. 205.

If such subsequent purchaser sue, and lay his action as for a continuous trespass, commencing with his grantor and continuing all the way down to the commencement of the action, without averring any new, independent act of trespass, the action will be defeated by showing the original entry to have been by the consent of the then owner. Thus being lawful in its inception, there was no trespass; and not being originally wrongful, its continuance as against such purchaser is not wrongful.<sup>1</sup> If the defendant justify under a license to enter, or to do the act complained of, the license must be pleaded.<sup>2</sup> In the leading case here cited, it is said that if the license be not granted by a deed, and be not coupled with an interest, it may be revoked at the pleasure of the person granting it, even if there be a consideration paid therefor, or expenses be incurred by reason of it.<sup>3</sup>

If one enter upon the land of another and dig a ditch thereon, he is a trespasser, and if he re-enter the land for the purpose of filling up the ditch he becomes a second time a trespasser; therefore the fact that he does not re-enter and abate the nuisance does not render him liable to an action for its continuance.<sup>4</sup> It is the duty of the injured party to make reasonable efforts to abate the nuisance.<sup>5</sup> Where recovery has been had for a completed wrong, no new action will arise from increased and unforeseen injury arising therefrom.<sup>6</sup>

In an action of trespass, where the defendant, a railroad company, had taken possession of a street opposite plaintiff's land, the fee of which was owned by him, without his consent, and without complying with the requirements of the law, it was held erroneous to instruct the jury that the plaintiff was en-

<sup>1</sup>Central R. R. Co. v. Hetfield, 5 Dutch. 206.

<sup>2</sup>Central R. R. Co. v. Hetfield, *supra*. A plea justifying an entry on lands under proceedings to condemn, in which no notice is given to the owner, as required by statute, is bad: Peoria & Rock Island Ry. Co. v. Warner, 61 Ill. 52, 12 Am. Ry. Rep. 444.

<sup>3</sup>Central R. R. Co. v. Hetfield, *supra*. And see Murdock v. Prospect Park & Coney Island R. R. Co., 73 N. Y. 579; Mathews v. St. Paul & Sioux City R. R. Co., 18 Minn. 434; Blais-

dell v. Portsmouth, G. F. & C. R. R. Co., 51 N. H. 483; Batchelder v. Hibbard, 53 N. H. 269; Irish v. Burlington & S. W. R. R. Co., 44 Ia. 380; Hoshier v. Kansas City, St. Jos. & C. B. R. R. Co., 60 Mo. 329.

<sup>4</sup>Kansas Pacific Ry. Co. v. Muhlman, 17 Kans. 224, 9 Am. Ry. Rep. 428.

<sup>5</sup>Kansas Pac. Ry. Co. v. Muhlman, *supra*.

<sup>6</sup>Kansas Pac. Ry. Co. v. Muhlman, *supra*.

titled to recover the difference between the value of the use of the premises with the railroad constructed and used as it was, with all its inconveniences, and the value of such use with the railroad there, but without such inconveniences. In such a case the damages could not exceed the difference between what would have been the rental value during the continuance of the trespass in case there had been no railroad there, and its actual rental value with the railroad constructed and operated as it was.<sup>1</sup> The fact that only a part of the width of defendant's track was upon the land would not affect this rule of damages.<sup>2</sup>

In Kentucky it is held, that the act of March 10, 1854, authorizing an owner to maintain an action for any trespass or injury to land committed while he was out of possession, was not continued in force by the general statutes.<sup>3</sup>

**2. Delay in perfecting right of way, after possession, may amount to trespass.**—Unreasonable delay on the part of the company to perfect their rights, after taking possession and occupancy of the premises, will convert such acts of occupancy into a trespass, and an action will accordingly lie therefor against the company, either in trespass or in case, as may be deemed preferable, for the recovery of all damages and injuries occasioned by the prior occupation of the property.<sup>4</sup> In the case cited from 34 Maine, *Cushman v. Smith*, the court lay down this principle in the following language: "The right to such temporary occupation as an incipient proceeding, will become extinct by an unreasonable delay to perfect proceedings, including the actual payment or tender of compensation"; and that "an action of trespass, or an action on the case, may be maintained."

**3. Trespass by intrusion on lands outside of right of way.**—Authority to take land, and the material thereon, for the right of way of a railroad company, does not include the right to enter upon, or take material from, the adjoining lands,<sup>5</sup> nor the

<sup>1</sup> *Blesch v. Chicago & North Western Ry. Co.*, 43 Wis. 183, 17 Am. Ry. Rep. 90.

<sup>2</sup> *Blesch v. C. & N. W. Ry. Co.*

<sup>3</sup> *Jeffersonville, Madison & Indianapolis R. R. Co. v. Esterle*, 13 Bush, 667, 17 Am. Ry. Rep. 111.

<sup>4</sup> *Cushman v. Smith*, 34 Maine, 247; *Nichols v. Somerset & Kennebec R.*

*Co.*, 43 Maine, 356; *Henry v. The Dubuque & Pacific R. R. Co.*, 10 Iowa, 540; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 1.

<sup>5</sup> *Parsons v. Howe and others*, 41 Maine, 218; *Payne v. The Bristol & Exeter R. W. Co.*, 1 Eng. R. W. Cases, 629; and for any such intrusion, as also for acts outside of corporate au-

right to make deposits of earth, stone, or other things thereon.<sup>1</sup> And, if, in the exercise of the right of blasting, or other process of cleaning away the ground taken, in order to prepare the road bed for the track, obstructions or deposits be cast upon or fall upon such adjoining lands, the company, if caused by their act, or the contractor, if by his independent act, must clear the same away in a reasonable time, and for want of proper diligence in so doing may become trespassers in respect thereto.<sup>2</sup>

**4. Trespass of servant of company.**—The master is ordinarily responsible for the trespass or willfully wrong act of his servant, if the act of the servant complained of be done in the course of his business employment;<sup>3</sup> or if it be done as an essential means of attaining the end directed by the master, and was intended for that purpose, then it is implied in the employment, and the master is liable, although the servant may have willfully and maliciously exceeded his authority.<sup>4</sup> But the master is not liable for the independent wrong act or willful trespass of the servant, not commanded by the master or ratified by him, but perpetrated to gratify the private hate or malignity of the servant, although done under color of discharging his duty to his employer. Such independent act of the servant gives no right of action against the master. The servant alone is responsible.<sup>5</sup> Nor will it do to say the master is accountable in damages because, by the employment, he gives the servant an opportunity to abuse or maltreat those with whom the business of his employment brings him in

thority, trespass lies: *Payne v. B. & E. Ry. Co.*, *supra*.

<sup>1</sup> *Parsons v. Howe*, *supra*.

<sup>2</sup> *Parsons v. Howe*, *supra*.

<sup>3</sup> *Evansville & Crawfordsville R. R. Co. v. Baum*, 26 Ind. 70; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis, Peru & Chi. Ry. Co. v. Anthony*, 43 Ind. 183; *Terre Haute & Indianapolis R. R. Co. v. Graham*, 46 Ind. 239; *Terre Haute & Indianapolis R. R. Co. v. Fitzgerald*, 47 Ind. 79; *Jackson v. Second Avenue R. R. Co.*, 47 N. Y. 274; *post*, chap. 40, subdiv. 1. And the rule applies equally to corporations as to individuals: *E. & C. R. R. Co. v. Baum*, *supra*.

<sup>4</sup> *Evansville & Crawfordsville R. R. Co. v. Baum*, 26 Ind. 70; *Jeffersonville R. R. Co. v. Rogers*, 38 Ind. 116; *Indianapolis, Peru & Chi. Ry. Co. v. Anthony*, 43 Ind. 183; *Terre Haute & Indianapolis R. R. Co. v. Graham*, 46 Ind. 239; *Terre Haute & Indianapolis R. R. Co. v. Fitzgerald*, 47 Ind. 79; *Jackson v. Second Avenue R. R. Co.*, 47 N. Y. (2 Sickels), 274.

<sup>5</sup> *Evansville & Crawfordsville R. R. Co. v. Baum*, 26 Ind. 70, 72; *Isaacs v. The Third Avenue R. R. Co.*, 47 N. Y. (2 Sickels), 122; *McManus v. Crickett*, 1 East, 106; *Gregory v. Piper*, 9 B. & C. 591; *Croft v. Alison*, 4 B. & Ald. 590.

contact in the discharge of his duties. Such reasoning would hold shopkeepers liable for the conduct of clerks, and mechanics liable for the conduct of their journeymen, and so in all departments of life where necessity or convenience requires the employment of servants or assistants to accommodate and deal with the public.<sup>1</sup>

**5. Actions by reversioners.**—Actions in tort will lie at the suit of a reversioner of real estate, against a railroad corporation, for injuries of so permanent a nature that the result thereof will be injurious to, and affect the reversionary interest.<sup>2</sup> And it is no defense thereto that such injuries are also a damage to the tenant in possession; each may have his action for the injury inflicted, if damage be sustained<sup>3</sup>—so soon, too, as the injury is inflicted; for the reversioner is not bound to wait until he comes into possession, to vindicate his rights.<sup>4</sup>

**6. Trespass lies in favor of the company.**—The same rule of liability exists, for injuries inflicted upon railroads by natural persons, as exists, outside of statutory provisions, in favor of natural persons as against railroad corporations, for injuries inflicted by the latter.<sup>5</sup> Thus, where an injury occurs to a railroad by reason of the trespass or intrusion of cattle thereon, the owner of such cattle is liable for the injury, if the cattle were there by his fault, or his neglect to properly restrain the same.<sup>6</sup>

**7. Affirmative defenses must be pleaded.**—If, in an action of trespass against the president and directors of a railroad corporation, for entering on and digging up the soil of the plaintiff,

<sup>1</sup> *Evansville & Crawfordsville R. R. Co. v. Baum*, 26 Ind. 70, 73. There are rulings to the contrary, such as *Penn. R. R. Co. v. Vandiver*, 42 Penn. St. 365; but they are an exception to, and not the true exposition of, the law, as is believed.

<sup>2</sup> *Tinsman v. The Belvidere Delaware R. R. Co.*, 1 Dutch. 255.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Macon & Western R. R. Co. v. Davis*, Admr., 13 Geo. 68; *York & Cumberland R. R. Co. v. Myers*, 41 Maine, 109; *Greenville & Columbia R. R. Co. v. Partlow*, 6 Richards.n's

Law, 286; *Main v. Northeastern R. R. Co.*, 12 Richardson's Law, 82; *Dater v. Troy Turnpike & R. R. Co.*, 2 Hill, 629.

<sup>6</sup> *Sinram v. Pittsburgh, Fort Wayne & Chi. Ry. Co.*, 28 Ind. 244; *Eames v. Salem & Lowell R. R. Co.*, 98 Mass. 563; *Northeastern R. R. Co. v. Sineath*, 8 Rich. 194; *New York & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298. And such liability may arise although cattle be free commoners, if negligently allowed by the owner to go at large in the immediate vicinity of a railroad: *Sinram v. P., F. W. & C. R. R. Co.*, *supra*.



iff's premises, the defendant will justify under the charter of the company, and its right to exercise and enforce the right of eminent domain, and to take property for the construction of the road of the corporation, and that the acts complained of were committed in the exercise of that right, such defense must be pleaded specially, and can not be raised by demurrer to a declaration in which those facts are not made to appear.<sup>1</sup>

. <sup>1</sup>President and Directors of Crawfordsville & Wabash R. R. Co. v. Wright, 5 Ind. 252. And so with re-

gard to a defense by limitation: Atlantic & Gulf R. R. Co. v. Fuller, 48 Ga. 423, 11 Am. Ry. Rep. 403.

## CHAPTER XXXVIII.

### DAMAGES BY FIRE.

	Section.		Section.
At common law . . . .	1	The fault or negligence must be	
Liability by statute . . . .	2	the proximate cause . . . .	3

**1. At common law.**—The general common law principles as to the liability of railroad companies for injuries caused by fire communicated from their locomotive engines, are the same as in other cases of injuries resulting from the use of fire. If used for a lawful purpose, upon one's own premises, without any fault or negligence, no liability attaches to the company. When "there is neither negligence nor folly in doing a lawful act, the party can not be chargeable with the consequences."<sup>1</sup> And al-

<sup>1</sup> *Burroughs and another v. The Housatonic R. R. Co.*, 15 Conn. 124, 131; *S. C. 2 Am. R. W. Cas.* 30; *The Philadelphia & Reading R. R. Co. v. Yeiser*, 8 Barr (8 Penn. St. R.), 366; *S. C. 2 Am. R. W. Cas.* 325; *The Frankford & Bristol Turnpike Co. v. Phila. & Trenton R. R. Co.*, 54 Penn. St. 345; *Philadelphia & Reading R. R. Co. v. Yerger*, 73 Penn. St. 121; *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 148; *Gandy v. Chi. & N. W. R. R. Co.*, 30 Iowa, 420; *S. C. 6 Am. R.* 682; *Garrett v. Chi. & N. W. Ry. Co.*, 36 Iowa, 121; *Radcliff's Ex'rs v. The Mayor and others*, 4 N. Y. 195; *Hays v. Miller*, 6 Hun, 320; *Bedford v. Hannibal & St. Joe Railroad Co.*, 46 Mo. 456; *Leavenworth, Lawrence & Galveston R. R. Co. v. Cook*, 18 Kans. 261, 15 Am. Ry. Rep. 350; *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Culver*, 60 Ind. 469. If there is no evidence of negligence at all, the court should instruct the

jury to find for the defendant: *Burroughs v. H. R. R. Co.*, *supra*, p. 126. That repeated fires occurred at the same place, is not proper evidence to go to a jury to raise the inference that the company was negligent: *Phil. & R. R. R. Co. v. Yeiser*, 8 Penn. St. (8 Barr), 366; *Edwards v. Ottawa River Nav. Co.*, 39 Upp. Can., Q. B. 264. But see, *contra*, *Snyder v. P., C. & St. L. Ry. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154; *Smith v. Old Colony & Newport R. R. Co.*, 10 R. I. 22, 6 Am. Ry. Rep. 144. In the latter case a distinction is made between fires occurring before and after the one causing the injury. Evidence that other engines of the same company passed over the same road, at the same place, for a considerable time, under similar conditions, without causing fires, will raise an inference of negligence as to the engine causing the injury: *Atchison, Topeka & Santa Fe R. R. Co. v. Stanford*, 12 Kans.

though property destroyed may have no actual market value, yet plaintiff may recover on proving a value.<sup>1</sup>

Burroughs and another *v.* Housatonic Railroad Company was an action on the case to recover damages for burning plaintiff's house, by sparks communicated from a passing engine. The house was situated very near the line of the railroad, and was erected there after the location of the road. There was no actual negligence or wrong imputable to the company in the use of their franchise. They had only used their engine in the usual and necessary manner of carrying out the objects of the corporation, upon the company's own premises. These acts were rendered lawful by the act of incorporation passed by the legislature. In disposing of the case, the Supreme Court of Connecticut say: "Where, then, there is neither negligence nor folly in doing a lawful act, the party can not be chargeable with the consequences. Thus, where the owner of land set fire upon his fallow grounds, which run into and consumed the plaintiff's woods, the defendant was held not to be liable, there being no negligence in him or his servants."<sup>2</sup>

In the same case the court hold the following language, as forcibly illustrative of the principle that a person is not liable for the consequences of the reasonable and lawful use of his own property, wherein he is guilty of no wrong, folly or neglect. "Have these defendants done any such act, or been guilty of any such negligence, as to subject themselves to this action; or have they used their lawful rights in a reasonable manner? What acts have they done? They have built their road, and put on their engines and cars, for the purpose of transporting pas-

354, 8 Am. Ry. Rep. 230. Evidence that fire had escaped from other locomotives of a similar pattern is incompetent to show insufficiency of the particular engine causing the fire, or negligence of the engineer: *Coale v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210; *Lester v. Kansas City, St. Joseph & Council Bluffs R. R. Co.*, 60 Mo. 265, 9 Am. Ry. Rep. 219; *Erie Ry. Co. v. Decker*, 78 Penn. St. 293; *Jennings v. Penn. R. Co.*, 93 Penn. St. 337; S. C. 37 Leg. Int. 157. Although evidence that

fire had been before communicated by the same engine is proper: *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168. But if the company assume to operate without authority, they will become liable for injuries in the absence of negligence: *Jones v. Festiniog Ry. Co.*, Law Rep. 3 Q. B. 733.

<sup>1</sup> *Atchison, Topeka & Santa Fe R. Co. v. Stanford*, 12 Kans. 354, 8 Am. Ry. Rep. 230.

<sup>2</sup> 15 Conn. 131.

sengers, by means of steam power, in the manner of other railroad companies. It is not denied, that all they have done is in exact conformity with the object of the act of incorporation. All they have done, then, must be lawful, if the legislature could make it so. Where, then, is the wrong? It is true, that a spark from their chimney struck the roof of the plaintiff's building and consumed it; but these defendants neither guided nor directed it. In what respect does it differ from a similar injury by a spark from a dwelling house? In either case the spark proceeds from a reasonable use of one's own property; it is guided in the same manner, takes the same direction, and produces the same injury. In the one case we say it is the effect of accident, or the hand of Providence: why not in the other? If there be in the one case, how can there be in the other?" In short, it is clearly settled that the use, by an incorporated railroad company, of its engines and road in a reasonable manner, is lawful, to effect the end contemplated by the legislative power in creating the corporate body, or in allowing, if such be the case, by a general law, the formation of such corporate body. For the consequences thereof the company is not liable, if it do no more than is proper and necessary, and do all that is proper and necessary, and do it in a proper and necessary manner, free from wantonness, folly or negligence on their part.<sup>1</sup> But as to what is the proper and lawful manner of using such locomotives and operating the road, and what will amount to negligence, wantonness or folly, these are still to be considered, and reconciled, if practicable, upon the authority of the adjudicated cases.

First, then, of negligence in the use of locomotive engines:

Though negligence is ordinarily a question of fact for the jury,<sup>2</sup> yet it sometimes becomes a matter clearly of legal defini-

<sup>1</sup> *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124, 128; *Slatten v. Des Moines Valley R. R. Co.*, 29 Iowa, 148; *Gandy v. Chi. & N. W. R. R. Co.*, 30 Iowa, 420; *S. C. 6 Am. R.* 682; *Radcliff's Exec'rs v. The Mayor and others*, 4 N. Y. 195; *The Frankford & Bristol Turnpike Co. v. Phila. & Trenton R. R. Co.*, 54 Penn. St. 345.

<sup>2</sup> *Jackson v. The Chicago & N. W.*

*R. R. Co.*, 31 Iowa, 176; *Huyett v. The Phila. & Reading R. R. Co.*, 23 Penn. St. 373; *The Lackawanna & Bloomsburg R. R. Co. v. Doak and another*, 52 Penn. St. 379; *Field v. The N. Y. Cent. R. R. Co.*, 32 N. Y. 339; *Webb v. The Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. (4 Sickels), 420; *Rood v. N. Y. & Erie R. R. Co.*, 18 Barbour, 80; *King v. Morris & Essex R. R. Co.*, 3 C. E.

tion and import.<sup>1</sup> Thus, by the current of authorities, it is the duty of railroad companies to use none but locomotive engines of the safest modern construction, in reference to safety as against the communicating of fire therefrom to property along the line of the road, and to have such engines supplied with all the best approved appliances to prevent the escape of sparks therefrom to the endangering of the property of others. The omission so to do, on the part of the company, is well settled in law to be negligence, and will subject the company to a recovery for damages occasioned thereby, provided it occur without the contributory negligence or fault of the owner of the property injured or destroyed;<sup>2</sup> or, as in some states, without a greater degree of negligence on the part of the owner.<sup>3</sup> And though the construction be of the approved character, and they be provided with the most safe modern appliances for the preventing of

Green's Ch. 397; *St. Louis, Alton & Terre Haute R. R. Co. v. Gilham*, 39 Ill. 455; *Toledo, Peoria & Warsaw Railway Company v. Pindar*, 53 Ill. 447; S. C. 5 Am. R. 57; *post*, chap. 52, subd'n 8.

<sup>1</sup> *Post*, chap. 52, subd'n 8.

<sup>2</sup> *Gandy v. The Chicago & N. W. R. R. Co.*, 30 Iowa, 420; S. C. 6 Am. R. 682; *Jackson v. Chi. & N. W. R. R. Co.*, 31 Iowa, 176; S. C. 7 Am. R. 120; *Small v. C., R. I. & P. R. R. Co.*, 50 Ia. 338; *Bedell v. The Long Island R. R. Co.*, 44 N. Y. 367; S. C. 4 Am. R. 688; *Webb v. The Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. (4 Sickels), 420; *Lack. & Blooms. R. R. Co. v. Doak and others*, 52 Penn. St. 379; *The Frankford & Bristol Turnpike Co. v. The Phila. & Trenton R. R. Co.*, 54 Penn. St. 345; *Bass v. C., B. & Q. R. R. Co.*, 28 Ill. 9; *Great Western R. R. Co. v. Haworth and others*, 39 Ill. 346; *Toledo, Peoria & Warsaw Ry. Co. v. Pindar*, 53 Ill. 447; S. C. 5 Am. R. 57; *Murphy v. Chicago & Northwestern Ry. Co.*, 45 Wis. 222, 18 Am. Ry. Rep. 17; *Snyder v. Pittsburgh, Cincinnati & St. Louis Ry. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

See, also, *Doggett v. Richmond & Danville R. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193, where the contributory negligence of the plaintiff is distinguished as proximate and remote, and the effect on the plaintiff's right of recovery of the negligence of intervening land owners is considered. Contributory negligence which will preclude a recovery by the plaintiff is where, in the presence of a *seen* danger (as where fire has been set), he omits to act prudently, or does some act inconsistent with the preservation of his property. But where the danger is merely anticipated, or dependent on the future continuance of defendant's negligence, plaintiff is not bound to guard against it: *Snyder v. P., C. & St. L. Ry. Co.*, *supra*. It is not contributory negligence in the plaintiff to leave open the windows of his building, if the company is negligent in not using spark-arresters: *Louisville, New Albany & Chi. Ry. Co. v. Richardson*, 66 Ind. 43.

<sup>3</sup> *Chi. & N. W. Ry. Co. v. Simonson and another*, 54 Ill. 504; S. C. 5 Am. R. 155; *post*, chap. 52, subd'n 2.

sparks and brands from escaping from such engines to the endangering of the neighboring property, it nevertheless devolves upon the company to use them in a prudent and careful manner, and not wantonly or recklessly.<sup>1</sup> To use them, even under such circumstances of proper construction and safeguards, where accumulations of dried grass or other combustible materials have been allowed by the company to accumulate and remain along or near the track, on their own premises, whereby such combustible matter is ignited, and fire is communicated therefrom to the property of others, and the latter is thus injured or destroyed, if not negligence in itself, in contemplation of law,<sup>2</sup> is, nevertheless, a case in which a jury may find it such, and the finding, unless for proper cause, will not be disturbed.<sup>3</sup> So,

<sup>1</sup> *Gandy v. Chi. & N. W. R. R. Co.*, 30 Iowa, 420; S. C. 6 Am. R. 682; *Jackson v. The Chi. & N. W. R. R. Co.*, 31 Iowa, 136; S. C. 7 Am. R. 120; *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 407; *Flynn v. San Francisco & San Jose R. R. Co.*, 40 Cal. 14; S. C. 6 Am. R. 595; *Fitch v. Pacific R. R. Co.*, 45 Mo. 322; *Lackawanna & Bloomsburg R. R. Co. v. Doak and another*, 52 Penn. St. 379; *The Frankford & Bristol Turnpike Co. v. The Phila. & Trenton R. R. Co.*, 54 Penn. St. 345; *Martin v. Western Union R. R. Co.*, 23 Wis. 437; *Smith v. Old Colony & Newport R. R. Co.*, 10 R. I. 22, 6 Am. Ry. Rep. 144. In the case of *Gandy*, above cited, the court characterize the stopping of an engine and stirring the fire in it in a place of peculiar peril, and the repeated and unusual dropping of coals, as tending to establish the fact of negligence.

<sup>2</sup> *Flynn v. San Francisco & San Jose R. R. Co.*, 40 Cal. 14; S. C. 6 Am. R. 595; *Perry v. Southern Pacific R. R. Co.*, 50 Cal. 578, 12 Am. Ry. Rep. 187; *Illinois Central R. R. Co. v. Nunn*, 51 Ill. 78; *Salmon v. Delaware, Lackawanna & Western R. R. Co.*, 38 N. J. 5, 13 Am. Ry. Rep. 14; *Del. & W. R. R. Co. v. Salmon*, 39 N. J. 299,

14 Am. Ry. Rep. 226. And where the duty to keep the track clear of such accumulations is imposed by statute, its omission is legal negligence: *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Campbell*, 86 Ill. 443.

<sup>3</sup> *Kellogg v. The Chi. & N. W. Ry. Co.*, 26 Wis. 223; S. C. 7 Am. R. 69; *Bass v. Chi., B. & Q. R. R. Co.*, 28 Ill. 9; *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 407; *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497; *Ill. Cent. R. R. Co. v. Nunn*, 51 Ill. 78; *Ohio & Miss. Ry. Co. v. Porter*, 2 Ill. 437; *Kesee v. The Chi. & N. W. R. R. Co.*, 30 Iowa, 78; S. C. 6 Am. R. 643; *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168; *Perry v. same, supra*; *Troxler v. Richmond & Danville R. R. Co.*, 74 N. Car. 377, 13 Am. Ry. Rep. 389; *Pittsburgh, Cincinnati & St. Louis R. R. Co. v. Nelson*, 51 Ind. 150; *Smith v. London & S. W. Ry. Co.*, Law Rep. 5 C. P. 98; S. C. 6 *Id.* 14. The rule in this regard is stated as follows in *Snyder v. Pittsburgh, Cincinnati & St. Louis Ry. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154: "From the evidence and all the circumstances and surroundings, including the dryness of the time, did the defendant permit such an accu-

likewise, in respect to contributory and comparative negligence on the part of the plaintiff, alleged to consist in like accumulations of dry and combustible material or matter on plaintiff's premises, along and near to the track of the railroad, the court will not charge the jury that it amounts *per se* to contributory or to comparative negligence, but will refer both the fact as to such accumulations, and the question of the plaintiff's negligence dependent thereon, to the jury for their decision.<sup>1</sup>

But although there be negligence on the part of the company, yet, to justify a recovery, the plaintiff himself is bound to have used a reasonable degree of care, and of endeavor to preserve his property.<sup>2</sup> Thus it is holden that the burning of money in a

"mulation of grass, weeds or leaves  
"of a combustible nature within its  
"right of way at the point where  
"said fire occurred, exposed to ignition by its engines, as would not be  
"permitted or done by a cautious and  
"prudent man upon his own premises  
"if exposed to the same hazard from  
"fire as the accumulation of the dry  
"grass, weeds or leaves upon the said  
"right of way of the defendant?" 11 W. Va. 37.

<sup>1</sup> *Kellogg v. The Chi. & N. W. Ry. Co.*, 26 Wis. 223; S. C. 7 Am. R. 69; *Murphy v. Chicago & North Western Ry. Co.*, 45 Wis. 222, 18 Am. Ry. Rep. 17; *Cook v. Champlain Transportation Co.*, 1 Denio, 91; *Kesee v. The Chi. & N. W. R. R. Co.*, 30 Iowa, 78; S. C. 6 Am. R. 643; *Fitch v. Pacific R. R. Co.*, 45 Mo. 322; *Coates v. Missouri, Kansas & Texas Ry. Co.*, 61 Mo. 38, 8 Am. Ry. Rep. 60; *Kansas Pac. Ry. Co. v. Brady*, 17 Kansas, 380. In *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497, and *Illinois Cent. Railroad Co. v. Nunn*, 51 Ill. 78, a contrary doctrine is announced, but by a divided court. It is holden in these cases, that suffering such combustible accumulations to remain near the railroad is negligence on the part of the landed proprietor, and that he can not recover

if damage is suffered by him from fire communicated thereto from the road. And see, also, *Salmon v. Delaware, Lackawanna & Western R. R. Co.*, 38 N. J. 5, 13 Am. Ry. Rep. 14; *Snyder v. Pittsburgh, Cincinnati & St. Louis Ry. Co.*, 11 W. Va. 14, 18 Am. Ry. Rep. 154.

<sup>2</sup> *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 407; *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497; *Ill. Cent. R. R. Co. v. Frazier*, 47 Ill. 505; *Toledo, Peoria & Warsaw Ry. Co. v. Pindar*, 53 Ill. 447; S. C. 5 Am. R. 57; *Chicago & N. W. Ry. Co. v. Simonson*, 54 Ill. 504; S. C. 5 Am. R. 155; *Chicago & Alton R. R. Co. v. Pennell*, 94 Ill. 448; *Ward v. Milwaukee & St. Paul Ry. Co.*, 29 Wis. 144, 12 Am. Ry. Rep. 193; *Burke v. Louisville & Nashville R. R. Co.*, 7 Heisk. 451, 12 Am. Ry. Rep. 497; *Doggett v. Richmond & Danville R. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193; *Woodson v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 60, 19 Am. Ry. Rep. 293. In *Shanefelt's* case it is distinctly holden that holders of improved lands contiguous to railroads are as much bound in law to keep their grounds free of accumulations of combustible material as are railroad companies to so keep their own; and the same is referred to and

dwelling-house, which house is burned by reason of the negligence of another party, will not give a cause of action for the loss of the money against the author of the negligence, if the owner of the money might by ordinary care have saved the same.<sup>1</sup> The rule applies with equal force to all other property.

The rule laid down by the Supreme Court of Iowa, in *Kesee v. The Chicago & North Western Railroad Company*, is that it is not negligence *per se*, on the part of a railroad company, to suffer such natural accumulation of dry grass and other combustible matter on the sides of their tracks as are liable to be ignited by sparks or fire from their engines, unless it be to such an extent as would not be permitted or done by a cautious and prudent man upon his own premises, if exposed to the same hazard from fire as are the combustibles so accumulated upon the right of way of the railroad company; but that if so suffered to accumulate and remain to a greater degree than would be permitted by a prudent and cautious man on his own premises under like circumstances, then the jury may infer negligence therefrom; and that if they find also from the evidence that fire or sparks from the engine set fire to such accumulated combustibles thus existing in greater extent than a cautious man would permit, and do also infer negligence therefrom, and that the fire passing on to plaintiff's premises from the grounds of the company set fire to plaintiff's property, then the company will be liable for the damages, unless contributed to by the negligence of the plaintiff himself; and that before plaintiff can recover, he must satisfy the jury by evidence that he has been guilty of no negligence which contributed directly to the injury, which may be shown by evidence of prudence and care on his part, in reference to exposure of the property destroyed; that though the owner of property along the line of a railroad has a right to stack his grain and hay, or to place other property, on his own premises near the road, yet

approved in the subsequent case of *Chicago & N. W. Ry. Co. v. Simonson*. But where the owner of a live animal, by direction of the railroad company's agent, used straw for bedding for the animal which was being transported in the cars, and the straw was ignited and the animal burned, the court held the company liable for

the loss, notwithstanding the participation of the plaintiff in procuring and using the dangerous material: *Powell v. Penn. R. R. Co.*, 32 Penn. St. (8 Casey), 414.

<sup>1</sup> *Toledo, Peoria & Warsaw Ry. Co. v. Pindar*, 53 Ill. 447; *Chicago & N. W. Ry. Co. v. Simonson*, 54 Ill. 504.



in so doing he takes the risk of accidents, but not of negligence of the company; and that if he leaves it unprotected when it could be better secured by plowing around it, and he fails to do so, or to use other means likely to protect it, he is guilty of contributive negligence, and can not recover for injury communicated by fire burning over the ground from the right of way of the railroad company.<sup>1</sup> But such imprudence of the adjacent owner will not render any less obligatory the duty devolving upon the railroad company of using due care on its part.

"Fire being a destructive element (say the Supreme Court of Iowa), persons using it are required to exercise all reasonably careful and prudent precautions against its spread."<sup>2</sup> And this rule extends to the use of railroad locomotives, in operating railroads. The care and prudence required by law to prevent injuries by fire from locomotives, call for the best contrivances for safety that are known; and unless such are used, there is negligence.<sup>3</sup> But the facts involving such negligence, or necessary to its existence, are matter for the decision of a jury.<sup>4</sup> And it matters not whether the injury be occasioned by the improper use

<sup>1</sup> *Kesee v. The Chicago & N. W. R. R. Co.*, 30 Iowa, 78; *Snyder v. Pittsburgh, Cin. & St. Louis Ry. Co.*, 11 W. Va. 14, 37; *Cook v. The Champlain Transportation Co.*, 1 Denio, 91.

<sup>2</sup> *Jackson v. The Chi. & N. W. R. R. Co.*, 31 Iowa, 136; S. C. 7 Am. R. 120; *Smith v. Old Colony & Newport R. R. Co.*, 10 R. I. 22; *Ward v. Mil. & St. Paul Ry. Co.*, 29 Wis. 144; *Spaulding v. Chi. & N. W. Ry. Co.*, 30 Wis. 110; *Read v. Morse*, 34 Wis. 315; *Longabaugh v. Va. City & T. R. R. Co.*, 9 Nev. 271; *Snyder v. Pittsburgh, Cin. & St. Louis Ry. Co.*, 11 W. Va. 14; S. C. 18 Am. Ry. Rep. 154.

<sup>3</sup> *Gandy v. Chi. & N. W. R. R. Co.*, 30 Iowa, 420; S. C. 6 Am. R. 682; *Jackson v. The Chi. & N. W. R. R. Co.*, 31 Iowa, 136; *Bevier v. Del. & Hudson Canal Co.*, 13 Hun, 254; *Chicago & Alton R. R. Co. v. Pennell*, 94 Ill. 448; *Pittsburgh, Cincinnati &*

*St. Louis R. R. Co. v. Nelson*, 51 Ind. 150; *Hoyt v. Jeffers*, 30 Mich. 181. Ordinary fuel may be used: *Collins v. N. Y. Cent. & H. R. R. R. Co.*, 5 Hun, 499; *Balt. & Susquehanna R. R. Co. v. Woodruff*, 4 Md. 242; *Lackawanna & B. R. R. Co. v. Doak*, 52 Penn. St. 379.

<sup>4</sup> *Jackson v. Chi. & N. W. R. R. Co.*, 31 Iowa, 136; *Huyett v. Phil. & Reading R. R. Co.*, 23 Penn. St. R. 373; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; *Field v. N. Y. Cent. R. R. Co.*, 32 N. Y. 339; *Briggs v. N. Y. Cent. & H. R. R. R. Co.*, 72 N. Y. 26; *Hays v. Miller*, 6 Hun, 320; *Coale v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210; *Chicago & Alton R. R. Co. v. Pennell*, 94 Ill. 448; *Atchison, Topeka & Santa Fe R. R. Co. v. Bales*, 16 Kansas, 252; *Kellogg v. Milwaukee & St. Paul Ry. Co.*, 5 Dill. 537.

of a properly constructed engine, or from a defect in the construction of the engine itself.<sup>1</sup>

In cases of loss by fire, set out by an engine upon a railroad, and involving the question of negligence, the mere fact of the injury does not amount to proof of negligence or wrong upon the part of the company. Such proof of setting out the fire, or escape thereof from the property of the company, is but one stage toward making out a case for recovery. The circumstances and facts relied upon as negligence are also to be proven, and are to be proven by the plaintiff. To recover, he must aver negligence on the part of the company, as also ordinary care on his part. To recover, the burden of proof is on him to prove what he thus necessarily avers. His allegations and proof must correspond.<sup>2</sup>

<sup>1</sup> *Jackson v. The Chi. & N. W. R. R. Co.*, 31 Iowa, 136.

<sup>2</sup> *Gandy v. The Chi. & N. W. Ry. Co.*, 30 Iowa, 420; *McCummons v. The Chi. & N. W. Ry. Co.*, 33 Iowa, 187; *Small v. C., R. I. & P. Ry. Co.*, 50 Ia. 338; *Macon & Western R. R. Co. v. McConnell*, 27 Geo. 481; *Sheldon v. Hudson River R. R. Co.*, 29 Barb. 226; *S. C. 14 N. Y.* 218; *Field v. N. Y. Cent. R. R. Co.*, 32 N. Y. 339; *Collins v. N. Y. Cent. & H. R. R. Co.*, 5 Hun, 503; *McCaig v. Erie Ry. Co.*, 8 Hun, 599; *Smith v. Hannibal & St. Joseph R. R. Co.*, 37 Mo. 287; *Huyett v. Phil. & Reading R. R. Co.*, 23 Penn. St. 373; *Jennings v. Penn. R. R. Co.*, 93 Penn. St. 337; *S. C. 37 Leg. Int.* 157; *Reading & Columbia R. R. Co. v. Latshaw*, 98 Penn. St. 449; *S. C. 37 Leg. Int.* 157, 9 Repr. 798; *McCreedy v. South Car. R. R. Co.*, 2 Strohh. 356; *Burroughs v. Housatonic R. R. Co.*, 15 Conn. 124; *Indianapolis & Cin. R. R. Co. v. Paramore & others*, 31 Ind. 147; *Doggett v. Richmond & Danville R. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193; *Sturgis v. Robbins*, 62 Me. 289. But it is held otherwise in Missouri. The rule in that state is that negligence is presumed from the escape of fire:

*Coale v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 227, 9 Am. Ry. Rep. 210; *Clemens v. Same*, 53 Mo. 366, 12 Am. Ry. Rep. 351; *Kenney v. Same*, 70 Mo. 243. And so in Tennessee: *Burke v. Louisville & Nashville R. R. Co.*, 7 Heisk. 451, 12 Am. Ry. Rep. 497. And see *Woodson v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 60, 19 Am. Ry. Rep. 293; *Burlington & Mo. R. R. Co. v. Westover*, 4 Neb. 268. In Illinois and Iowa this rule exists by statute: *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Campbell*, 86 Ill. 443; *Small v. C., R. I. & P. Ry. Co.*, 50 Ia. 338. If the fire, after it had been ignited, could have been prevented by the employes on the road from spreading to plaintiff's property, the company is chargeable with gross negligence: *Kenney v. Hannibal & St. Joseph R. R. Co.*, 63 Mo. 99, 20 Am. Ry. Rep. 275; *S. C. 70 Mo.* 252. See, as to proper allegations in that respect, and as to when the variance, if any, should be taken advantage of, *Ibid.* But is not necessary to identify the engine causing the fire: *Bevier v. Del. & Hudson Canal Co.*, 13 Hun, 254; *Penn. R. R. Co. v. Stranahan*, 79 Penn. St. 405.

In Georgia the ruling is, that persons who build or make erections near to that which may endanger them, the same being in itself lawful, as, for instance, making erections or placing property dangerously near to railroads or railroad woodyards, do so at their own risk; except as to injuries caused by the negligence of the company from whose property or engines the fire emanates;<sup>1</sup> and that the negligence, to cause liability, must in such cases be gross.<sup>2</sup> This latter ruling was had upon a retrial of the same case above cited, after it had once been reversed.

The ruling in Illinois in regard to the application of the doctrine of remote and proximate cause is, that taking into consideration the direction of the wind, the state of the weather, and all the surrounding circumstances and localities, if the effect of the negligently allowing fire to escape from a railroad locomotive and communicate itself to the neighboring property, would be, in the apprehension of a reasonable person, to set fire to and consume the property for which compensation is claimed, and without the aid of any new circumstance or incident, then the cause is proximate, and the loss is the proximate result of setting out the fire, and the company is liable.<sup>3</sup> But if some new

<sup>1</sup> *Macon & Western R. R. Co. v. McConnell*, 27 Ga. 481. And see *Phil. & Reading R. R. Co. v. Hendrickson*, 80 Penn. St. 182; *Chicago & Alton R. R. Co. v. Pennell*, 94 Ill. 448; *Kansas Pac. Ry. Co. v. Brady*, 17 Kans. 380; *Small v. C., R. I. & P. R. R. Co.*, 50 Iowa, 338. But see *contra*, *Kellogg v. Chi. & N. W. Ry. Co.*, 26 Wis. 223; *Ward v. Milwaukee & St. Paul Ry. Co.*, 29 Wis. 144, 12 Am. Ry. Rep. 193; *Caswell v. Chicago & N. W. Ry. Co.*, 42 Wis. 193, 15 Am. Ry. Rep. 162; *Murphy v. C. & N. W. Ry. Co.*, 45 Wis. 222, 18 Am. Ry. Rep. 17; *Burke v. Louisville & Nashville R. R. Co.*, 7 Heisk. 451, 12 Am. Ry. Rep. 497. Expert testimony is not admissible to show whether a structure would be considered as exposed to risk: *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 4 Otto, 469, 17 Am. Ry. Rep. 309. And so where the owner of a ware-

house and track near it employed the engine of a railroad company to draw cars over it, and the engine threw sparks badly, which was noticed by plaintiffs, and after some use of the engine the warehouse was ignited by the sparks and burned, the company was held not liable: *Marquette, Houghton & Ontonagon R. R. Co. v. Spear*, 44 Mich. 169; S. C. 6 N. W. Repr. 202, 21 Am. Ry. Rep. 242. It does not affect the matter that the company, on complaint being made of the throwing of sparks, promised to repair "some time": *Ibid*.

<sup>2</sup> *Macon & Western R. R. Co. v. McConnell*, 31 Geo. 133.

<sup>3</sup> *Fent and another v. Toledo, Peoria & Warsaw Ry. Co.*, 59 Ill. 349. And see *Hoag v. Lake Shore & Mich. Southern R. R. Co.*, 85 Penn. St. 293, 18 Am. Ry. Rep. 405.

agency is brought to bear upon the condition of things after the fire has been started, whereby its communication to other property is caused or accelerated—as, for instance, the suddenly springing up of a high wind, by which the fire is carried along, and extended to other property than it would, by a reasonable supposition, have communicated to but for such new circumstance—then the original cause is remote, the loss is the remote result thereof, and the company is not liable.<sup>1</sup> Moreover, these circumstances are matters of fact for a jury to decide, under the charge of the court.<sup>2</sup>

But to enable a plaintiff to recover, in Illinois, for injuries incurred by fire escaping from a locomotive and communicated to dry grass, negligently allowed to accumulate on defendant's right of way grounds, and thence to like accumulations allowed by plaintiff to remain on his adjoining grounds, and thence to the property injured, it must appear that the negligence of the company in that respect was gross when compared with that of the plaintiff; or, at all events, that the negligence of the defendant was greater than that of the plaintiff, while that of the latter was slight.<sup>3</sup> These two terms, gross and greater, are occasionally used by the courts of this state in the same connection, as if intended to convey the same meaning.

By the statute of Illinois of 1869 (Gross' Comp., 554, Sec.

<sup>1</sup> Fent and others v. Toledo, Peoria & Warsaw Ry. Co., 59 Ill. 349; Toledo, Wabash & Western Ry. Co. v. Muthersbaugh, 71 Ill. 572.

<sup>2</sup> Fent and others v. Toledo, Peoria & Warsaw Ry. Co., 59 Ill. 349; Delaware, Lackawanna & Western R. R. Co. v. Salmon, 39 N. J. 299, 14 Am. Ry. Rep. 226; Perry v. Southern Pacific R. R. Co., 50 Cal. 578, 12 Am. Ry. Rep. 187; Clemens v. Hannibal & St. Joseph R. R. Co., 53 Mo. 366, 12 Am. Ry. Rep. 351; Phil. & Reading R. R. Co. v. Hendrickson, 80 Penn. St. 182; Hoag v. Lake Shore & Mich. Southern R. R. Co., 85 Penn. St. 293; S. C. 18 Am. Ry. Rep. 405; Briggs v. N. Y. Cent. & H. R. R. Co., 72 N. Y. 26; Kellogg v. Milwaukee & St. Paul Ry. Co., 5 Dill. 537. See as to when a

special verdict as to negligence of the company is sufficiently certain, Caswell v. Chicago & N. W. Ry. Co., 42 Wis. 193, 15 Am. Ry. Rep. 162. But where the facts are undisputed, and the intervening agency manifest, it may become a question for the court: Hoag v. L. S. & M. S. R. R. Co., *supra*.

<sup>3</sup> Chi. & N. W. Ry. Co. v. Simonson, 54 Ill. 504; or, in states holding the rule of contributory negligence, that the negligence of the plaintiff was remote and that of the defendant proximate: Fitch v. Pac. R. R. Co., 45 Mo. 322; Lester v. Kansas City, St. Jos. & C. B. R. R. Co., 60 Mo. 265; Phil. & Reading R. R. Co. v. Schultz, 93 Penn. St. 341; S. C. 37 Leg. Int. 386.

103), if it be established that an injury has been occasioned by sparks of fire emitted from an engine, that fact itself is full *prima facie* evidence of negligence on the part of the company and its agents and servants in charge of the same at the time. Such proof entitles a plaintiff to recover, if nothing more be shown on either side, and therefore throws the burden of proof upon the defendant to show, by way of rebuttal, that at the time of the alleged injury, the engine was equipped with the necessary and most effective appliances to prevent the escape of fire, and was not only in good repair, but was properly, carefully and skillfully handled by a competent engineer.<sup>1</sup> It is not enough that the engine was originally properly equipped with the appliance aforesaid, to prevent escape of fire; it must be shown that it was so at the time, and was in good order. The law requires of the company and its employes constant and vigilant care that engines be kept in good order, so as not to be dangerous to property along the road.<sup>2</sup>

A railroad company is liable for injuries from fire communicated by the locomotive of another company, which the defendants permitted to be run on their road without any spark-arrester on it, its defective condition being known to the defendant's train-dispatcher.<sup>3</sup>

That an engine throws sparks to a distance of one hundred feet from the track of the railroad, is held, in Illinois, to be presumptive evidence that it is not supplied with the proper spark-arrester, and of negligence in that respect. Therefore evidence of that fact is admissible, to show the character of the engine used in a given case.<sup>4</sup> And though a railroad company failing to use such appliances, and to keep the same in proper order, will ordinarily be liable for the damages resulting from such failure, yet if it is in the power of the injured party or his serv-

<sup>1</sup>Chi. & Alton R. R. Co. v. Quaintance, 58 Ill. 389; Rockford, Rock Isld. & St. Louis R. R. Co. v. Rogers, 62 Ill. 346; Pittsburgh, Cin. & St. Louis Ry. Co. v. Campbell, 86 Ill. 443. See Small v. Chi., Rock Isl. & Pac. R. R. Co., 50 Iowa, 338.

<sup>2</sup>Chicago & Alton R. R. Co. v. Quaintance, 58 Ill. 389, 398; Ill. Cent. R. R. Co. v. Mills, 42 Ill. 407.

<sup>3</sup>Delaware, Lackawanna & Western R. R. Co. v. Salmon, 39 N. J. 299, 14 Am. Ry. Rep. 226; Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Campbell, 86 Ill. 443.

<sup>4</sup>Ill. Cent. R. R. Co. v. McClelland, 42 Ill. 355 (1866). And see Burke v. Louisville & Nashville R. R. Co., 7 Heisk. 451, 12 Am. Ry. Rep. 497.

ants to prevent the injury by arresting the progress of the fire by the exercise of a reasonable diligence, and he fails to exercise such diligence, it is such negligence as will prevent a recovery.<sup>1</sup>

The custom of throwing burning brands from locomotive engines *en route* along the road is a dangerous one, and is within the act of the fireman's employment, if committed by him in the course of his service; and if negligently done, and injury ensue by reason of fire thereby communicated, the company will be liable.<sup>2</sup>

The obligations of ordinary care are different upon vehicles that can change or choose their track, or safely stop or lessen their speed, from what they are upon railway trains, which can pursue but one track in reference to passing objects, as also in reference to objects and property situated by the wayside, and being passed by them, and which may not stop or lessen speed but at the risk of a collision.<sup>3</sup> The one kind can diverge to either hand, as a prudent regard for others may require, or even stop entirely, or slacken speed, whilst the other must proceed in the track of their route, without the power to change the same, and must run by the time table.<sup>4</sup> So the latter, unlike ordinary vehicles, may be compelled to proceed or to stop as the programme for their running may require, in order to avoid collisions ahead or from behind, whilst ordinary vehicles are controllable in this respect.<sup>5</sup>

Neither is the ordinary care which is due from a railroad company to owners of property alongside the track, in respect to danger from fire escaping from the engines of defendant, in any degree dependent upon the state of the weather or wind, as to wet or dry, calm or stormy. Their route and their speed is at all times the same, and so is their obligation, for the necessities of regularity and uniformity in their running are not matters of choice or convenience merely, but involve the safety of persons

<sup>1</sup> Ill. Cent. R. R. Co. v. McClelland, 42 Ill. 355, 359; Toledo, Peoria & Warsaw Ry. Co. v. Pindar, 53 Ill. 447; Chi. & Alton Ry. Co. v. Pennell, 94 Ill. 454; Doggett v. Richmond & Danville R. R. Co., 78 N. Car. 305, 16 Am. Ry. Rep. 193.

<sup>2</sup> Spaulding v. Chi. & N. W. Ry. Co., 33 Wis. 582, 590.

<sup>3</sup> Mich. Cent. R. R. Co. v. Anderson, 20 Mich. (2 Clarke), 244.

<sup>4</sup> The Mich. Cent. R. R. Co. v. Anderson, *supra*.

<sup>5</sup> The Mich. Cent. R. R. Co. v. Anderson, 20 Mich. (2 Clarke), 244. See Brusberg v. M., L. S. & W. Ry. Co., 50 Wis. 231; S. C. 6 N.W. Repr. 821.

and trains everywhere along the road.<sup>1</sup> Thus they may not vary with wind or weather; and if they are run with ordinary care and the proper equipments, and approved spark arresters, the risk of danger devolves on those who establish themselves or reside along such roads, as incident to their situation; and as the extra care demanded devolves on those whose interest demands increased vigilance, so the consequences of want of it fall upon the owner, for the railroad company, in merely exercising its rights, is not in fault.<sup>2</sup>

If a shipper of property by rail reclaim and take possession thereof while the same is in transit, and the same be then destroyed by fire whilst in his possession, or in the possession of those in whose charge he entrusts it, the loss is his own, and not that of the company, although he may not remove the same from the place where found.<sup>3</sup>

The fact that the railroad company acquired their right of way through the plaintiff's land by grant or condemnation will not prevent a recovery.<sup>4</sup> These proceedings have reference only to such damages as naturally and necessarily arise from the use of the land for the authorized purpose, and will not bar the recovery of damages for injuries arising from an unskillful or improper construction, or negligence in operating the road.<sup>5</sup>

A like liability rests upon a railroad company for the baggage of a passenger, upon its arrival, as for freight carried by it. Therefore if, when the baggage safely arrives at its place of destination, the owner be not there to receive it, or do not take charge of it if present, but leaves it with the company, it is its duty to store the baggage for safe keeping, and when that is done, the character of carrier ceases, and that of warehouseman begins, and if the same be destroyed by fire without the negligence of the company, it is not responsible therefor.<sup>6</sup>

<sup>1</sup> The Mich. Cent. R. R. Co. v. Anderson, 20 Mich. (2 Clarke), 244.

<sup>2</sup> The Mich. Cent. R. R. Co. v. Anderson, 20 Mich. (2 Clarke), 244.

<sup>3</sup> Cleveland & Pittsburgh R. R. Co. v. Sargent, 19 Ohio St. 438.

<sup>4</sup> Delaware, Lackawanna & Western R. R. Co. v. Salmon, 39 N. J. 299, 14 Am. Ry. Rep. 226.

<sup>5</sup> D., L. & W. R. R. Co. v. Salmon,

*supra*; Small v. C., R. I. & P. Ry. Co., 50 Ia. 338. Parol evidence of the items of damage allowed is inadmissible. The award is a matter of record, and must be produced: Caswell v. Chicago & N. W. Ry. Co., 42 Wis. 193, 15 Am. Ry. Rep. 162.

<sup>6</sup> Roth v. The Buffalo & State Line R. R. Co., 34 N. Y. (7 Tiffany), 543.

The acceptance of rent, however nominal in amount, by a railroad company, for the privilege of making erections on and occupying the company's right of way grounds, when done to facilitate the receipt and delivery of freights, amounts to evidence of a license to occupy and use the grounds to the extent and in the manner thus paid for, and in effect places the parties in the relative position to each other of landlord and tenant, and is not inconsistent with the uses and purposes for which right of way grounds are ordinarily held by railroad companies.<sup>1</sup> In a suit involving the alleged liability of a railroad company for injury by fire from its engines to such property, a receipt given by the company for such rent is properly in evidence, as showing the consent of the company to such occupancy, although given after suit commenced.<sup>2</sup>

In determining whether the fire which caused destruction to property situated along the route of a railroad was communicated from the company's engine, it is competent to prove that locomotives of the same company were accustomed to scatter fire in passing the *locus in quo*, at times immediately preceding the alleged burning, as tending to show a negligent habit of the officers and agents of the railroad company, and as tending to show the burning to have been done by fire from a locomotive of defendant.<sup>3</sup>

And where the property destroyed was situated along the route of the defendant railroad, or in proximity thereto, the Supreme Court of the United States hold that a state statute making railroad companies liable for injury done by their locomotives, unless such companies show that they have used all due caution and diligence, and employed suitable expedients, to prevent such injuries, and where the same law gives railroad companies an insurable interest in property situated along the route of their roads, creates such liability whether the fire be in the first place communicated directly from the locomotive to the

<sup>1</sup> Grand Trunk R. R. Co. v. Richardson *et al.*, 1 Otto (U. S. S. C.), 454; Western Union Tel. Co. v. Rich, 19 Kans. 517.

<sup>2</sup> Grand Trunk R. R. Co. v. Richardson *et al.*, 1 Otto, 454.

<sup>3</sup> Grand Trunk R. R. Co. v. Richardson *et al.*, 1 Otto, 454; Cleaveland v.

Grand Trunk Ry. Co., 42 Vt. 449; Ill. Cent. R. R. Co. v. McClelland, 42 Ill. 358; Sheldon v. Hudson River R. Co., 14 N. Y. 218; Field v. N. Y. Cent. R. R. Co., 32 N. Y. 339; Longabaugh v. Va. City & T. R. R. Co., 9 Nev. 271.



property destroyed, or in a secondary manner, from other property so set on fire by fire from a locomotive, if the property so secondarily burned be also situate along, or in proximity to, the route of the road.<sup>1</sup> The court thus ruled, however, in the leading case here cited, upon the strength of the statute of Vermont alone, and not upon general principles involving the doctrine of proximity and remoteness, and decline to sustain or overrule the case of *Ryan v. The New York Cent. R. R. Co.*, 35 N. Y. 210, and *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353, but considers them in conflict with a large majority of decisions made by the American courts in similar cases.<sup>2</sup>

Under the statutes of Iowa, the occupant of land under color of title is the owner of improvements made by him thereon in good faith. Therefore, in an action for the destruction of such improvements by fire, the title to the land is immaterial.<sup>3</sup> And a mother may recover for the destruction of clothing furnished to an infant daughter living with her.<sup>4</sup>

In actions at common law for damages occasioned by fire communicated from the company's engines, the *gravamen* of the action is negligence.<sup>5</sup> This may be proven by direct or by circumstantial evidence.<sup>6</sup> Therefore, where the defendant has given evidence tending to repel the idea that sparks from the engine would have flown the distance from the road as that of a building destroyed, and on account of which the action was brought,

<sup>1</sup> *Grand Trunk R. R. Co. v. Richardson et al.*, 1 Otto, 454. See *Hart v. Western R. R. Co.*, 13 Met. 99; *Ingersoll v. Stockbridge & P. R. R. Co.*, 8 Allen, 438; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Hooksett v. Concord R. R. Co.*, 38 N. H. 242; *Pratt v. Atlantic & St. Lawrence R. R. Co.*, 42 Me. 579.

<sup>2</sup> *Grand Trunk R. R. Co. v. Richardson et al.*, 1 Otto, 454, 471, 472. And see, to the same effect, *Delaware, Lackawanna & Western R. R. Co. v. Salmon*, 39 N. J. 299, 14 Am. Ry. Rep. 226.

<sup>3</sup> *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 4 Otto, 469, 17 Am. Ry. Rep. 309. A vendee in possession under a

contract of sale may maintain his action for such injuries: *Rood v. N. Y. & E. R. R. Co.*, 18 Barb. 80; *Hays v. Miller*, 6 Hun, 320; *Miller v. Long Island R. R. Co.*, 9 Hun, 194.

<sup>4</sup> *Burke v. Louisville & Nashville R. R. Co.*, 7 Heisk. 451, 12 Am. Ry. Rep. 497.

<sup>5</sup> *Sheldon v. The Hudson River R. R. Co.*, 14 N. Y. (4 Kernan), 218.

<sup>6</sup> *Sheldon v. Hudson River R. R. Co.*, *supra*; *Hoyt v. Jeffers*, 30 Mich. 181; *Kenney v. Hannibal & St. Joseph R. R. Co.*, 70 Mo. 243; *Smith v. London & S. W. Ry. Co.*, Law Rep. 5 C. P. 98; *S. C. 6 Id.* 14; *Atchison, Topeka & Santa Fe R. R. Co. v. Bales*, 16 Kans. 252.

it was ruled that evidence was admissible to show that on other occasions sparks were thrown from the company's engines, at the same place, to a similar distance.<sup>1</sup> Though negligence may not be inferred, yet an inference that the engines were not properly secured against the escape of sparks may arise from proof of the distance to which a company's engines are accustomed to throw their sparks ordinarily; and therefore evidence of such circumstance, in a trial for damage done by fire alleged to have been communicated from an engine of the same company, is admissible.<sup>2</sup>

But it being lawful to propel engines by fire, and possible for sparks to escape notwithstanding the utmost safeguards, negligence will not be inferred against the company, in New York, from the simple fact of communicating fire from an engine.<sup>3</sup> In Wisconsin, however, the contrary is the ruling, and it is there held that the communication of fire by sparks escaping from a passing railroad engine is presumptive evidence that the engine is defective in respect to a proper spark-arrester, or of some defect in the proper construction or use of the same.<sup>4</sup> Such presumption throws upon the railroad company the burden of proof to show that the engine and appliances are of the proper kind, and in good condition and properly used.<sup>5</sup>

<sup>1</sup> *Sheldon v. Hudson River R. R. Co.*, *supra*; *Westfall v. Erie Ry. Co.*, 5 Hun, 75; *Hoyt v. Jeffers*, *supra*. And this, too, although it occurred at another place than the one in question: *Penn. R. R. Co. v. Stranahan*, 79 Penn. St. 405.

<sup>2</sup> *Sheldon v. The Hudson River R. R. Co.*, 14 N. Y. (4 Kernan), 218, 224.

<sup>3</sup> *Sheldon v. The Hudson River R. R. Co.*, 14 N. Y. (4 Kernan), 218, 224; *Burroughs v. The Housatonic R. R. Co.*, 15 Conn. 124; *Ruffner v. Cincinnati, Hamilton & Dayton R. R. Co.*, 34 Ohio St. 96, 21 Am. Ry. Rep. 1; *ante*, p. 796.

<sup>4</sup> *Spaulding v. Chi. & N. W. Ry. Co.*, 33 Wis. 582, 593; *Same v. same*, 30 Wis. 110. And it is so held in Missouri: *Fitch v. Pacific R. R. Co.*, 45 Mo. 324; *Bedford v. Hannibal*

& St. Joseph R. R. Co., 46 Mo. 456; *Clemens v. Hannibal & St. Joseph R. R. Co.*, 53 Mo. 366, 12 Am. Ry. Rep. 351; *Coale v. same*, 60 Mo. 227; *Coates v. Missouri, Kansas & Texas Ry. Co.*, 61 Mo. 38, 8 Am. Ry. Rep. 60; *Kenny v. Hann. & St. Jos. R. R. Co.*, 70 Mo. 252. And see *Burke v. Louisville & Nashville R. R. Co.*, 7 Heisk. 451, 12 Am. Ry. Rep. 497; *Woodson v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 60, 19 Am. Ry. Rep. 293. But the rule is different in New Jersey, at least in proceedings by indictment: *Morris & Essex R. R. Co. v. State*, 36 N. J. Law, 553, 12 Am. Ry. Rep. 470.

<sup>5</sup> *Spaulding v. Chi. & N. W. Ry. Co.*, 33 Wis. 582, 593; *Same v. same*, 30 Wis. 110; *Coates v. M., K. & T. Ry. Co.*, *Fitch v. Pacific R. R. Co.*,

In Maryland, railroads are held liable for injuries by fire escaping from their engines, only when the company are chargeable in that respect with negligence.<sup>1</sup> The act of assembly of 1837 made them responsible irrespective of negligence—absolutely.<sup>2</sup> In 1838 another act on the subject was passed, declaring such companies liable for damages by fire, until proven by them not to have been occasioned by their negligence. The ruling in that state upon these statutes is that the last act repealed the absolute liability force of the former, and restored the liability to the principles of the common law—for negligence only—but transferred the burden of proof to the defendant.<sup>3</sup>

So in Delaware, if proper appliances be adopted and used, the company are only liable for fire escaping from their engines when occasioned by want of care.<sup>4</sup>

To allow accumulations of dry grass and other material on railroad grounds is not negligence *per se*, in Nebraska, but is proper evidence for the consideration of the jury.<sup>5</sup> Nor is it contributory negligence for the land owner to neglect to plough along next to the railroad in his field, to prevent the spread of fire.<sup>6</sup> And where fire from the engine passed unbroken over a space of half a mile across fields, and then did an injury, the injury so done at that distant point was held not to be remote, but that the company were liable.<sup>7</sup>

An agreement to build and deliver to a railroad company certain railroad cars, the builder to furnish all materials except the boxes, which are to be furnished by the company, and the cost thereof to be deducted from the price agreed on for the cars,

Clemens v. H. & St. J. R. R. Co., Bedford v. same, Coale v. same, Kenney v. same, *supra*. It is not enough to show that the engine was operated in the customary manner, without showing that to be a careful manner: Woodson v. M. & St. P. Ry. Co., *supra*.

<sup>1</sup> Balt. & Susq. R. R. Co. v. Woodruff, 4 Md. 242.

<sup>2</sup> Balt. & Susq. R. R. Co. v. Woodruff, *supra*.

<sup>3</sup> Balt. & Susq. R. R. Co. v. Woodruff, *supra*; Balt. & Ohio R. R. Co. v. Dorsey, 37 Md. 19; Annapolis & Elk-

ridge R. R. Co. v. Gantt, 39 Md. 115; Balt. & Ohio R. R. Co. v. Shipley, *Id.* 251.

<sup>4</sup> Jefferis v. Phil., Wil. & Balt. R. R. Co., 3 Houston, 447.

<sup>5</sup> Burlington & Mo. R. R. in Nebraska v. Westover, 4 Neb. 268.

<sup>6</sup> Burlington & Mo. R. R. in Neb. v. Westover, 4 Neb. 268; Snyder v. Pittsburgh, Cincinnati & St. Louis Ry. Co., 11 W. Va. 14, 18 Am. Ry. Rep. 154.

<sup>7</sup> Burlington & Mo. R. R. in Neb. v. Westover, 4 Neb. 268.

is in legal effect a contract to sell so many cars to the company;<sup>1</sup> and the title to them remains in the builder until completed and delivered.<sup>2</sup> If, before completion and delivery, they be accidentally destroyed by fire without the fault of the company, it is the builder's loss.<sup>3</sup> Such, too, is the case although the completion and delivery be delayed by reason of delay of the company in furnishing the boxes.<sup>4</sup>

To carelessly cut a fireman's hose, by running over it whilst being used to play upon a burning building, by reason of which the building is entirely consumed, is actionable as the proximate cause of the injury, and the company are liable therefor.<sup>5</sup> But damages caused by the spread of the fire to other property, as the supposed result of such injury, are too remote to bear an action.<sup>6</sup>

It is not a matter of defense to an action for loss occasioned by fire growing out of the negligence of the company, that the property destroyed was insured; or even, if insured, that the insurance has been paid. If paid to the insured, and he also recover and collect damages for the same loss from the company, he thereby becomes a trustee for the insurance company for the amount so paid by it, not to exceed the amount of recovery from the railroad company, and is bound to repay the same to the insurance company.<sup>7</sup>

To our mind the American cases clearly recognize seven classes of cases settled by authorities in regard to damages by fire communicated from engines of railroad corporations, each of which are to be regarded as controlling, and as a rule of decision, within their own respective judicial spheres.

<sup>1</sup> *McConihe v. New York & Erie R. Co.*, 20 N. Y. (6 Smith), 495.

<sup>2</sup> *McConihe v. New York & Erie R. Co.*, *supra*.

<sup>3</sup> *McConihe v. New York & Erie R. Co.*, *supra*.

<sup>4</sup> *McConihe v. New York & Erie R. Co.*, *supra*.

<sup>5</sup> *Metallic Comp. Casting Co. v. The Fitchburg R. R. Co.*, 109 Mass. 277; *Hyde Park v. Gay*, 120 Mass. 589; *Atkinson v. Newcastle & G. W. W. Co.*, Law Rep. 6 Exch. 404.

<sup>6</sup> *Mott v. The Hudson River R. R.*

*Co.*, 1 Robertson (N. Y. S. Ct.), 585; *Same v. Same*, 8 Bosw. (N. Y.), 345. But see *M. C. C. Co. v. Fitchburg R. Co.*, *supra*; *Atkinson v. N. & G. W. W. Co.*, *supra*.

<sup>7</sup> *Weber v. The Morris & Essex R. R. Co.*, 35 N. J. (6 Vroom), 409; *Weber v. The Morris & Essex R. R. Co.*, 36 N. J. (7 Vroom), 213; *Monmouth Co. Mut. Fire Ins. Co. v. Hutchinson*, 6 C. E. Green, 107; *Hart v. Western R. R. Co.*, 13 Met. 99; *Collins v. N. Y. Cent. & H. R. R. Co.*, 5 Hun, 503; *Briggs v. Same*, 72 N. Y. 26.

1. That except where altered by express statutory enactment, there prevails, everywhere in the American courts, the well known common law rule, that one is not liable for the consequences to others of a prudent and lawful use of fire upon his own premises, if without fault or negligence on his part, although it escape, if without his fault, to that of his neighbor, and do him an injury there.<sup>1</sup>

2. That one is liable for an injury that occurs to another by an imprudent or unlawful use of fire on his own premises; or if properly used there, then for negligently suffering it to escape to the premises of another, whereby a damage is done to the owner thereof.<sup>2</sup>

3. But to sustain an action in such cases, the injury must be the direct and proximate result of, solely the act complained of; or, in other terms, the act complained of must alone have been the direct, proximate and sole cause of the injury and damage sustained, and not merely remotely so.<sup>3</sup>

4. That the cause of the injury is proximate, and the damage is the proximate result thereof, so long as the fire is continuous in its progress and ravages, by an unbroken chain or connection.<sup>4</sup>

5. That the cause of the injury is but remote, and the damage is but the remote result thereof, as to all the ravages of the fire caused by a re-kindling thereof, or communication of it anew,

<sup>1</sup> *Burroughs and another v. Housatonic R. R. Co.*, 15 Conn. 124; *Slaten v. DesMoines Valley R. R. Co.*, 29 Iowa, 148; *Gandy v. Chi. & N. W. R. R. Co.*, 30 Iowa, 420; *Bedford v. Hannibal & St. Joe R. R. Co.*, 46 Mo. 456; *Phila. & Reading R. R. Co. v. Yeiser*, 8 Penn. St. 366; and other authorities, *ante*, p. 788.

<sup>2</sup> *Hays v. Miller*, 6 Hun, 320; *Hewey v. Nourse*, 54 Me. 256; *Pittsburgh, Cin. & St. Louis Ry. Co. v. Culver*, 60 Ind. 469; *Read v. Morse*, 34 Wis. 315; *Filliter v. Phippard*, 11 Q. B. 347.

<sup>3</sup> *Morrison v. Davis*, 20 Penn. St. 171; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; *Same Case*, 1 Am. R. 431; *Ryan v. N. York Cent. R. R. Co.*, 35 N. Y. 210; *Kellogg v. Chi. & N. W. Ry. Co.*, 26 Wis. 223; *Same Case*, 7 Am.

R. 69; *Toledo, Peoria & Warsaw Ry. Co. v. Pindar*, 53 Ill. 447; *Same Case*, 5 Am. R. 57; *post*, subdn. 3.

<sup>4</sup> *Oil Creek & Allegheny River Ry. Co. v. Keighron*, 74 Penn. St. 316; *S. C. 6 Am. Ry. Rep.* 192; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; *Penn. & N. Y. Canal & R. R. Co. v. Lacey*, 89 *Id.* 458; *Kuhn v. Jewett*, 5 *Stew. (N. J.)*, 647; *Kellogg v. Milwaukee & St. Paul Ry. Co.*, 5 *Dill.* 537; *White v. Col. Cent. R. R. Co.*, *Id.* 428; *Atchison, Topeka & Santa Fe R. R. Co. v. Bales*, 16 *Kans.* 252; *Hoyt v. Jeffers*, 30 *Mich.* 181; *Poepers v. Mo., Kans. & Tex. Ry. Co.*, 67 *Mo.* 715; *Smith v. London & S. W. Ry. Co.*, *Law Rep.* 5 C. P. 98; *S. C. 6 Id.* 14.

from and beyond where there occurs an open break in the burning, or chain of its continuity. That in such latter case the first fire, and not the original negligence of the party setting it out, is the cause of the latter, and of the injury done thereby; and that therefore the original setting out and the latter injury are, in their relations to each other, remote, and no liability exists.<sup>1</sup>

6. Under the statute in Massachusetts, the rule of liability as settled in the courts of that state is, that railroad corporations are absolutely liable for all damages caused by fire communicated from their engines, irrespective of the question of negligence.<sup>2</sup>

7. That by statute in some others of the states, where the negligence of the company is yet an ingredient of liability, the injury is made to be presumptive evidence of negligence, and the burden is shifted onto the railroad companies, defendants, to negative the same by proof of proper care.<sup>3</sup>

The case cited from 103 Massachusetts is one in which the fire

<sup>1</sup> *Doggett v. Richmond & D. R. R. Co.*, 78 N. Car. 305; S. C. 16 Am. Ry. Rep. 193; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 4 Otto, 469, 17 Am. Ry. Rep. 309. And a finding by the jury that fire was communicated to defendant's elevator by their negligence, and that the burning of plaintiff's mill was the unavoidable consequence of the burning of the elevator, amounts to a finding that no independent cause intervened: *R. R. Co. v. Kellogg*, *supra*. The measure of damages is the value of the property destroyed at the time and place of its destruction; not the cost of replacing it: *Donald v. St. Louis, Kansas City & Northern Ry. Co.*, 44 Ia. 157; *Atchison, Topeka & Santa Fe R. R. Co. v. Stanford*, 12 Kans. 354; *Burke v. Louisville & Nashville R. R. Co.*, 7 Heisk. 451, 12 Am. Ry. Rep. 497; or where trees are destroyed, the difference between their value before and after the fire: *Atkinson v. The Atlantic & Pacific R. R. Co.*, 63 Mo. 367; S. C. 20 Am. Ry. Rep. 442; *Bevier v. Del. & Hudson Canal Co.*, 13 Hun, 254. Interest is not al-

lowable under the Missouri statutes: *Kenney v. Hannibal & St. Joseph R. R. Co.*, 63 Mo. 99, 20 Am. Ry. Rep. 275; *Atkinson v. A. & P. R. R. Co.*, *supra*.

<sup>2</sup> *Hart v. Western R. R. Co.*, 13 Met. 99; *Quigley v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438, 440; *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Perley v. Eastern R. R. Co.*, 93 Mass. 414; *Safford v. Boston & Maine R. R. Co.*, 103 Mass. 583. In the case of *Perley v. E. R. R. Co.*, *supra*, the fire was continuous across fields of grass, burning all the way to the principal place of mischief; but the liability was not put upon such continuity of burning, but principally upon the absolute character of the Massachusetts statute.

<sup>3</sup> *Annapolis & Elkridge R. R. Co. v. Gantt*, 39 Md. 115; *Balt. & Ohio R. R. Co. v. Shipley*, *Id.* 251; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Pittsburgh, Cin. & St. Louis Ry. Co. v. Campbell*, 86 Ill. 443; *Small v. Chi., Rock Island & Pac. R. R. Co.*, 50 Ia. 338.

was communicated from defendant's engine to some wood and ties belonging to defendant, and situated near to defendant's freight house. The fire thence communicated to the freight house and station house, and there being a high wind, the fire thence passed on and communicated to a dwelling-house, some fifteen hundred feet distant from where it originated, and destroyed the house and some other buildings. The court held the company liable under the Massachusetts statute. The question of negligence was not involved, either in the pleadings or evidence, but the liability was claimed solely upon the statute. The Court, CHAPMAN, J., said: "We can not distinguish this case from *Hart v. Western Railroad Company*, 13 Met. 99, and *Perley v. The Eastern Railroad Company*, 98 Mass. 414." In *Perley v. The Eastern Railroad Company*, the fire spread across fields, without break therein, a half mile or more, and the court held, under the Massachusetts statute, that the company was liable, unless the mischief was contributed to by efforts made to stop the fire by firing against it, which latter question was referred to the jury, with the rest of the case, and the jury found a verdict for plaintiff.

**2. Liability by statute.**—In some of the American states the statute imposes absolute liability upon railroad corporations for damages caused by fire communicated from their engines, irrespective of the question of defendant's negligence.<sup>1</sup> In others, proof of such communication of fire from passing engines is made *prima facie* evidence of negligence on the part of the company.<sup>2</sup> Thus making negligence, as at the common law, the basis of a recovery, but at the same time exempting the plaintiff from the necessity of proving it; thereby throwing upon the defendant the burden of negating the existence thereof.

<sup>1</sup> Iowa Code of 1873, Sec. 1289. *Hart v. Western R. R. Co.*, 13 Met. 99; S. C. 1 Am. R. W. Cas. 414; *Lyman v. Boston & Worcester R. R. Co.*, 4 Cush. 288; S. C. 1 Am. R. W. Cas. 581; *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438, 440; *Perley v. Eastern R. R. Co.*, 98 Mass. 414; *Safford v. Boston & Maine R. R. Co.*, 103 Mass. 583.

<sup>2</sup> Gilbert's Ill. Railway Law, Sec. 331; Rev. Stat. Ill. 1874, chap. 114, sec. 78, p. 814; *Chi. & N. W. Ry. Co. v. McCahill*, 56 Ill. 28; *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Campbell*, 86 Ill. 443; *Small v. C., R. I. & P. Ry. Co.*, 50 Ia. 338; *Slosson v. Burlington, Cedar Rapids & Northern R. R. Co.*, 51 Ia. 294; *Libby v. C., R. I. & P. R. R. Co.*, 52 Ia. 92.

Before the enactment of this statute in Illinois, the rule, as laid down in the courts of that state, as to the liability of railroad companies in such cases, was the same as at common law, a mere question of fault or of negligence; and the burden of proof rested upon the plaintiff.<sup>1</sup> So it was in Iowa previous to the statute of 1873, cited above from the code of that state.<sup>2</sup>

Under a statute of Massachusetts, providing that "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible in damages to the person or corporation so injured," it is holden that such liability is not confined to injuries occasioned by direct communications of fire from the locomotive to such property, but exists, under a fair construction of the statute, in relation to other property to which the fire may be transmitted by ordinary means, from the house or property to which it is first communicated. The court say: "In the present case, the fire was transmitted, by ordinary and natural means, from the shop first touched by sparks from the engine, to the plaintiff's dwelling-house, immediately across a street not very wide. The building burnt was, then, near the route of the railway. Under these circumstances, the court are of opinion, that the plaintiff's house was injured by fire communicated by the locomotive engine of the defendants, within the true meaning of this statute."<sup>3</sup>

In such case the liability of the railroad company is, in legal effect, if the property be insured, first as principal, and that of the insurance company secondary; not, however, in order of time, but in order of ultimate liability. "The assured may first apply to whichever of these parties he pleases; to the rail-

<sup>1</sup> Ills. Cent. R. R. Co. v. Mills, 42 Ill. 407; Chi. & Alton R. R. Co. v. Quaintance, 58 Ill. 389; Toledo, Wabash & Western Ry. Co. v. Larmon, 67 Ill. 68; Chi. & Alton R. R. Co. v. Pennell, 94 Ill. 448.

<sup>2</sup> Hanlon v. Ingram, 3 Ia. 81; Gandy v. Chi. & N. W. R. R. Co., 30 Ia. 420; Jackson v. Chi. & N. W. R. R. Co., 31 Iowa, 176; S. C. 7 Am. R. 120.

<sup>3</sup> Hart v. The Western R. R. Co.,

13 Met. 99; S. C. 1 Am. R. W. Cas 414; Ingersoll v. Stockbridge & Pittsfield R. R. Co., 8 Allen, 438; Perley v. Eastern R. R. Co., 98 Mass. 414; Safford v. Boston & Me. R. R. Co., 103 Mass. 583. And see Grand Trunk R. R. Co. v. Richardson, 91 U. S. 454; Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Me. 579; Hooksett v. Concord R. R. Co., 38 N. H. 242.



road company, by his right at law, or to the insurance company, in virtue of his contract." But if he resorts first to the railroad company, and recovers of it, the amount received, if less than his whole loss, is to be deducted from his claim on the insurers, which is then only for the balance. It follows, therefore, that if he first proceed against the insurance company, and recover his whole loss, he then holds the claim against the railroad company in trust for the insurers, and by necessary implication there is an equitable assignment to the insurers of the right to recover as against the railroad company, and by indemnifying the assured against the expense thereof, they may prosecute suit in his name against the railroad company for the loss, for the benefit of the insurers, and the assured can not release the same.<sup>1</sup>

As a means for indemnity for the liability thus imposed upon railroad companies, the statute confers upon such companies an insurable interest in the property for which it may be so held responsible in damages, situated along its route, and allows such companies to procure insurance thereon in its own behalf.<sup>2</sup> It is held, in the courts of that state, that this statute is not of a penal nature, but is purely remedial, and is to be interpreted liberally to secure indemnity to parties injured by those who reap advantage by the use of dangerous modes of locomotion.<sup>3</sup> It is also held, that in cases arising under that statute the defendant is liable irrespective of negligence or want of care; but that if the plaintiff be guilty of contributory negligence he can not recover.<sup>4</sup> Moreover, that where the facts are undisputed, and taken together show a clear case of negligence of the plaintiff, the court is bound to instruct the jury that, having the bur-

<sup>1</sup> *Hart v. The Western R. R. Co.*, 13 Met. 99; *S. C. 1 Am. R. W. Cas.* 414; *Gracie v. N. York Ins. Co.*, 8 Johns. 245. See *Conn. Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399; *S. C. 10 Hun*, 59.

<sup>2</sup> Stat. 1840, C. 85, § 1, and General Stats. 1863, C. 63, § 101; *Ross v. Boston & Worcester R. R. Co.*, 6 Allen, 87.

<sup>3</sup> *Lynan v. Boston & Worcester R. R. Co.*, 4 Cush. 288; *Hart v. Western R. R. Co.*, 13 Met. 99; *Ross v. Boston &*

*Worcester R. R. Co.*, 6 Allen, 87, 90; *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Trask v. Hartford & New Haven R. R. Co.*, 16 Gray, 71; *Perley v. Eastern R. R. Co.*, 98 Mass. 414. And see *Pratt v. A. & St. L. R. R. Co.*, *supra*.

<sup>4</sup> *Ross v. Boston & Worcester R. R. Co.*, 6 Allen, 87; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454. But see *Rowell v. R. R. Co.*, 57 N. H. 132.

den of proof on himself to show due and reasonable care, he can not recover.<sup>1</sup>

And by statute in Massachusetts it is further provided, that no locomotive engine or other motive power shall be allowed to run upon a railroad constructed by authority of that state, except such as is owned and controlled by the corporation owning and managing the road, unless with the consent of the corporation.<sup>2</sup> By the same statute, railroad corporations whose roads connect with each other are empowered to contract that each shall perform all the transportation of persons and freight upon and over the road of the other, subject to the liability, however, of the company owning the road, for all damages done or injury sustained thereon, to the same extent as if such damage or injury occurred in the use of the road by the company owning the road. Under that statute the owners are held liable for injuries committed by the lessees of the road.<sup>3</sup>

And it does not matter whether the land itself is granted, or the mere right of way; nor that the company hold under an actual grant, or by assessment under the statute. In either case the statute is equally applicable, and the liability in Massachusetts is absolute.<sup>4</sup> But in Pennsylvania an assessment for the right of way and payment of the damages assessed covers the probable injury resulting, without negligence or malice, from sparks or fire communicated from the companies' locomotive engines to the property of the adjacent land owner; and proof of such assessment and payment may be made in defense of an action for damages caused by fire thus communicated, in an action by the landowner against the company.<sup>5</sup> And so, in the latter state, in case the

<sup>1</sup> *Ross v. Boston & Worcester R. R. Co.*, 6 Allen, 87.

<sup>2</sup> *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438.

<sup>3</sup> *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Daniels v. Hart*, 118 Mass. 543; *Davis v. Providence & Worcester R. R. Co.*, 121 Mass. 134. And see *Bean v. Atlantic & St. Lawrence R. R. Co.*, 63 Me. 293. The lessees, or trustees so working the road, if bondholders, are also liable: *Daniels v. Hart*, and *Davis v. P. & W. R. R. Co.*, *supra*.

<sup>4</sup> *Lyman v. Boston & Worcester R. R. Co.*, 4 Cush. 288; *S. C. 1 Am. R. W. Cas.* 581; *Safford v. The Boston & Maine R. R. Co.*, 103 Mass. 583; *Pierce v. Worcester & N. R. R. Co.*, 105 Mass. 199.

<sup>5</sup> *Philadelphia & Reading R. R. Co. v. Yeiser*, 8 Penn. St. R. 366; *S. C. 2 Am. R. W. Cas.* 325; *Wilmington & R. R. R. Co. v. Stauffer*, 60 Id. 374. And see *Proprs. of Locks & Canals v. Nashua & Lowell R. R. Co.*, 10 Cush. 392; *In re Utica, C. & S. V. R. R. Co.*, 56 Barb. 456; *Somerville & Easton*

landowner intrudes upon the ground so taken and paid for, by making erections thereon, and the erections be burned by fire communicated from passing engines, without wantonness on the part of the company, no recovery can be had therefor. Proof of such intrusions and erections is proper, as tending to show contributive negligence on the part of the injured party.<sup>1</sup>

Under the statute of Maine of 1842, Ch. 9, Sec. 5, which provides that "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said corporation shall be held responsible in damages to the person or corporation so injured," and gives to railroad corporations an insurable right or interest in property along their routes, it is held by the Supreme Judicial Court of that state that such liability does not extend to loose property along the route of a railroad, temporarily there, not in the nature of it and of the circumstances insurable articles in such temporary location, and movable in character;<sup>2</sup> and that therefore for cedar posts deposited temporarily along or near the line of a railroad, and there destroyed by fire from the company's engine, the company were not responsible.<sup>3</sup> But by the construction of the Maine courts, said statute includes growing trees and timber standing in proximity to the railroads.<sup>4</sup> The term *property*, in said act of assembly, includes both real and personal estate;<sup>5</sup> and insurance may be effected on either, and when a subject of insurance, the statute liability applies thereto.<sup>6</sup> The term "along the route" is construed to

R. R. Co. v. Doughty, 2 Zab. 495; Hatch v. Cin. & Ind. R. R. Co., 18 Ohio St. 124; Colvill v. St. Paul & Chi. Ry. Co., 19 Minn. 283. But see *contra*, Sunbury & E. R. R. Co. v. Hummell, 27 Penn. St. 99; Lehigh Valley R. R. Co. v. Lazarus, 28 Id. 203; Patten v. Northern Cent. Ry. Co., 33 Id. 426.

<sup>1</sup> Philadelphia & Reading R. R. Co. v. Yeiser, 8 Penn. St. R. 366.

<sup>2</sup> Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Maine, 579; Chapman v. Atlantic & St. Lawrence R. R. Co., 37 Maine, 92. But see Ross v. Boston & Worcester R. R. Co., 6 Allen, 87. The remedy for loss as to movable

property rests on a common law basis, and involves the question of negligence of the respective parties: 37 Maine, 92.

<sup>3</sup> Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Maine, 579.

<sup>4</sup> Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Maine, 579; Ross v. Boston & Worcester R. R. Co., 6 Allen, 87.

<sup>5</sup> Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Maine, 579.

<sup>6</sup> Pratt v. Atlantic & St. Lawrence R. R. Co., 42 Maine, 579. And so in Mass: Hart v. Western R. R. Co., 13 Met. 99.

include property within such distance of the road as to expose it to danger from fire communicated from the engines.<sup>1</sup>

If one holding the actual legal title to property, though in fact as security for a debt, and subject to be conveyed to the debtor upon satisfaction of the debt, be insured thereon against loss by fire communicated from locomotives of a railroad, and a building on such property be burned within the terms of the policy, he may recover for the whole amount of the loss, to the extent of his assurance, and is not restricted to simply the amount of his debt. The only right of recovery is in him.<sup>2</sup> If he recovers more than the amount of his debt, that is a matter betwixt him and his debtor.<sup>3</sup> And if the assured assign his right of action against the railroad company to the insurance company, on reception of the amount due him from it, the insurance company or their agent may recover the same of the railroad company.<sup>4</sup> So if the assured, in such case, collect of the insurance company only the amount of his debt for which he held the property, and yet assign to the insurance company his whole claim for damages against the railroad company, with an agreement on its part to pay over to the assured whatever sum is recovered from the railroad company in excess of such debt, it will be legal, and a recovery may be had for the whole loss.<sup>5</sup>

**3. The fault or negligence must be the proximate cause.**—To justify a recovery, however, at common law, against a railroad company for loss by fire, it is not enough that there be negligence or want of care, as hereinbefore stated to be necessary to create liability, but such negligence or improper conduct of the company must be the proximate, and not remote, cause of the injury. On this point all the authorities are agreed.<sup>6</sup> But as

<sup>1</sup> *Pratt v. A. & St. L. R. R. Co.*, *supra*.

<sup>2</sup> *Bean v. The Atlantic & St. Lawrence R. R. Co.*, 58 Maine, 82.

<sup>3</sup> *Bean v. The Atlantic & St. Lawrence R. R. Co.*, 58 Maine, 82.

<sup>4</sup> *Bean v. The Atlantic & St. Lawrence R. R. Co.*, 58 Maine, 82.

<sup>5</sup> *Bean v. The Atlantic & St. Lawrence R. R. Co.*, 58 Maine, 82. Under the Kansas Statute (Genl. Stat., Ch. 118, Sec. 2), negligence of the company is necessary to sustain the action:

*Missouri, Kans. & Tex. Ry. Co. v. Davidson*, 14 Kan. 349.

<sup>6</sup> *Morrison v. Davis*, 20 Penn. St. 171; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; S. C. 1 Am. R. 431; *Ryan v. New York Cent. R. R. Co.*, 35 N. Y. 210; *Kellogg v. The Chi. & N. W. Ry. Co.*, 26 Wis. 223; S. C. 7 Am. R. 69; *Toledo, Peoria & Warsaw Ry. Co. v. Pindar*, 53 Ill. 447; S. C. 5 Am. R. 57; *Doggett v. Richmond & Danville R. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193.

to what causes are proximate and what ones are remote, or rather, as to when the alleged cause is to be considered as proximate, and when remote, is a point not so easily settled, and about which there is a diversity of decisions.

Some of the authorities hold that the cause must be direct; that is, that the fire must be communicated in the first instance from the company's grounds, engines or works, to the property for the destruction of which the action is brought; and that it is not sufficient to charge the company that it be communicated to one piece of property, or building, and from that to another, to enable the owner of such other to recover against the company for the destruction thereof.<sup>1</sup> Irrespective of any views of our own as to which is the more reasonable view of the question, these respective decisions, until a different ruling be had therein, must be regarded as of equal authority in the respective states wherein they have been made; and the courts of other states will be left to their own guidance, or to choose, as they may prefer, to follow the one or the other of the rulings herein referred to.

Others of the authorities, of equal respectability, but under certain statutes, maintain that the cause is proximate, in a statutory point of view, when the origin of the fire is traceable to the negligence or wrong act of the company, whether the fire be directly in the first instance communicated to the property destroyed, or be communicated to the latter from other burning property so set on fire by the negligence of the company; and going still further, assert the liability to follow the continuation of the fire from the first, not only to the second, but thence on to the third, fourth, or other still more distant buildings or property reached and destroyed in its progress by the fire so in the first instance communicated from the engines or other property of the company;<sup>2</sup> and this, too, irrespective of possible, not to

<sup>1</sup> *Morrison v. Davis & Co.*, 20 Penn. St. (8 Harris), 171; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; *S. C. 1 Am. R. 431*; *Oil Creek & Allegheny River Ry. Co. v. Keighron*, 74 Penn. St. 316, 6 Am. Ry. Rep. 192; *Hoag v. Lake Shore & Mich. Southern R. R. Co.*, 85 Penn. St. 293, 18 Am. Ry. Rep. 405; *Harrison v. Berkley*, 1 Strob. (S. C.), 548; *Field v. New York Central R. R.*

*Co.*, 32 N. Y. 339; *Ryan v. The New York Cent. R. R. Co.*, 35 N. Y. 210; 1 Red. R. W. Cas. 341; *Webb v. Rome, W. & O. R. R. Co.*, 3 Lansing (N. Y.), 453.

<sup>2</sup> *Hart v. Western R. R. Co.*, 13 Met. 99; *Ross v. The Boston & Worcester R. R. Co.*, 6 Allen, 87; *Ingersoll v. Stockbridge & Pittsfield R. R. Co.*, 8 Allen, 438; *Perley v. The Eastern R.*

say probable, intervening causes of the further progress of the fire to other property from that to which it is at first communicated. According to these latter rulings, if A, having the small pox, carelessly intrudes himself into the residence of B, and thereby communicates the disease to B, and the disease being, as it is well known to be, contagious, spreads or communicates itself to the next neighbor of B, and so on, from person to person, throughout an entire village or community, each infected one may in turn maintain an action for damages by reason thereof against A, irrespective of the exciting causes; as, for instance, omission to vaccinate, imperfect vaccination, uncleanness, or natural predisposition of persons to contract the disease; by reason of each or of all which the spread of the contagion is caused or increased.

This question as to when the cause is proximate and when it is remote, in reference to the destruction of property by fire, is said by Chief Justice THOMPSON, in *Pennsylvania Railroad Company v. Kerr*, to have never been "definitely" settled in the English courts.<sup>1</sup> In America the only adjudications thereof within our knowledge, and which are clear of statutory entanglements, seem to be nearly equal in number on each side of the question, and hold directly opposing conclusions. In some of the states the former or more strict rule prevails;<sup>2</sup> whilst in others the latter or latitudinarian rule is sustained;<sup>3</sup> each reviewing

R. Co., 98 Mass. 414; *Fent and others v. The Toledo, Peoria & Warsaw Ry. Co.*, 59 Ill. 349.

<sup>1</sup> *Pennsylvania R. R. Co. v. Kerr*, 62 Penn. St. 353; S. C. 1 Am. R. 431, 437.

<sup>2</sup> *Ryan v. New York Cent. R. R. Co.*, 35 N. Y. 210; *Morrison v. Davis*, 20 Penn. St. 171; *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353; S. C. 1 Am. R. 431; *Hoag v. L. S. & M. S. R. R. Co.*, *supra*; *Harrison v. Berkley*, 1 Strobt. (S. C.), 548; *Atchison, Topeka & Santa Fe R. R. Co. v. Stanford*, *supra*.

<sup>3</sup> *Fent and others v. The Toledo, Peoria & Warsaw Ry. Co.*, 59 Ill. 349; S. C., 1 Red. Am. R. W. Cas., 350; *Webb v. Rome, Watertown & Ogdensburg*

*R. R. Co.*, 49 N. Y. 420; *Ins. Co. v. Tweed*, 7 Wall. 44; *Kellogg v. Chicago & N. Western Ry. Co.*, 26 Wis. 223; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; *Penn. & N. Y. Canal & R. R. Co. v. Lacey*, 89 *id.* 458; *Kuhn v. Jewett*, 5 Stew. (N. J.), 647; *Del., Lack. & Western R. R. Co. v. Salmon*, 39 N. J. 299; S. C. 14 Am. Ry. Rep. 226; *White v. Col. Cent. R. R. Co.*, 5 Dill. 428; *Kellogg v. Milwaukee & St. Paul Ry. Co.*, 5 Dill. 537; *Atchison, Topeka & Santa Fe R. R. Co. v. Bales*, 16 Kans. 252; *Hoyt v. Jeffers*, 30 Mich. 181; *Fitch v. Pac. R. R. Co.*, 45 Mo. 324; *Coates v. Mo., Kans. & Tex. Ry. Co.*, 61 Mo. 38; S. C. 8 Am. Ry. Rep. 60; *Poeppers v. Mo., Kans. & Tex. Ry. Co.*, 67 Mo.

the whole subject in question, and prior decisions bearing thereon.

The cases here cited from Massachusetts, favoring the more latitudinarian doctrine, were decided under a statute of that state, which provides that "every railroad corporation shall be responsible in damages to *any* person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines."

In *Morrison v. Davis & Co.*<sup>1</sup> the court say, LOWRIE, Justice, in treating of proximate and remote causes of injury: "There are often very small faults which are the occasion of the most serious and distressing consequences. Thus, a momentary act of carelessness set fire to a little straw, and that set fire to a house, and, by an extraordinary concurrence of very dry weather and high winds, with this fault, one third of a city (Pittsburgh) was destroyed. Would it be right that this small act of carelessness should be charged with the whole value of the property consumed?"

In the case of the *Pennsylvania Railroad Co. v. Kerr*, above cited,<sup>2</sup> the learned Chief Justice THOMPSON, reviewing the whole

715; *Smith v. London & S. W. Ry. Co.*, Law Rep. 5 C. P. 98; S. C. 6 *Id.* 14; *Henry v. So. Pac. R. R. Co.*, 50 Cal. 176; S. C. 12 Am. Ry. Rep. 168; *Troxler v. Richmond & Danville R. R. Co.*, 74 N. Car. 377; S. C. 13 Am. Ry. Rep. 339. In the case of *Kellogg v. C. & N. W. Ry. Co.*, above cited, the cases of *Ryan v. N. York Cent. R. R. Co.*, 35 N. Y. 210, and of *Penn. R. R. Co. v. Kerr*, 62 Penn. St. 353, are referred to, and descanted on doubtfully, but at the same time distinguished from the one under consideration, and in the discussion of which latter the court express dissatisfaction with the decision in the two cases above referred to. But the case of *Kellogg v. Chi. & N. Western Ry. Co.*, in which these views are expressed, is one in which, in the language of the court considering it, "there was but one burning, one continuous conflagration from the time the fire was

set on the railroad until the plaintiff's property was destroyed. The combustible material extended, and the ground was burned over, all the way from the railroad to the plaintiff's property. \* \* \* There was no distinct or separate setting fire to or burning of the stacks or buildings, and then a communication of the fire by sparks through the air from one stack or building to another. There was no succession of events, but only one event." P. 239. In this view of the case, then, the disapprobation expressed as to the cases of *Ryan* and *Kerr* amounts to nothing. It is mere *obiter dictum*. And see the late case of *Oil Creek & Allegheny River Ry. Co. v. Keighron*, 74 Penn. St. 316, 6 Am. Ry. Rep. 192, where fire was communicated by a locomotive to an oil car, and from thence to plaintiff's house.

<sup>1</sup> 20 Penn. St. 171, 176.

<sup>2</sup> 62 Penn. St. 353.

history and the law of remote and proximate injury, sternly condemns the idea of liability other than that resulting directly and immediately from the act complained of. That case was for damages for burning plaintiff's hotel. The facts were, that by the carelessness of the company, fire was communicated from a locomotive to a warehouse situated near to the railroad track. The fire communicated from the burning warehouse to the plaintiff's hotel, situated some thirty-nine feet from the warehouse, and destroyed the hotel. The court held that the injury was remote, and was not the proximate result of the negligence, and that the plaintiff could not recover; and, in delivering their opinion, adverted to and approved the ruling in *Ryan v. The New York Central Railroad Company*. In the course of his decision the learned Chief Justice THOMPSON says: "Innumerable occasions must have occurred in this Commonwealth for asserting liability to the extent and upon the principle claimed here, yet we have not a solitary precedent of the kind in our books. This is worth something as proof against the alleged principle." The learned judge then with much force adds: "It was Littleton's maxim, 'that what never was, never ought to be.'"<sup>1</sup>

Speaking of the case of *Ryan v. The New York Central Railroad Company*, the learned judge, in reference thereto and to the question under discussion, says: "The question in hand has not been adjudicated in this state, and but seldom discussed in any of the other states; yet we have a case decided in the Court of Appeals of the state of New York, in 1866, which is directly in point in support of the doctrine we have been endeavoring to advance above. It is the case of *Ryan v. The New York Central Railroad Co.*, 35 N. Y. 210." After proceeding to show that the plaintiff in that case was non-suited by the court below, on a state of facts showing that, by the act of carelessness of the company, fire was set to its own woodshed, from one of the company's own locomotives, and that the fire communicated therefrom to plaintiff's house, situated some hundred and thirty feet from the burning shed, and thereby the plaintiff's house was consumed, the learned judge then says: "The case was then removed to the Court of Appeals, where the judgment was unanimously affirmed in an elaborate and exhaustive opinion by

<sup>1</sup>62 Penn. St. 367, 368.



HUNT, J. Every position taken by the counsel for the defendant in error here was taken there, and examined and answered fully in the opinion. All the English and American cases supposed to have any bearing on the point in dispute there on the same question we have here, are noticed by him, and the doctrine clearly deduced that the railroad company was not answerable to the plaintiff for the loss of his house, being burned by fire communicated by the burning shed. That case is not distinguishable in principle, or in the manner of destruction, from this.”<sup>1</sup> The same learned judge (THOMPSON), and in the same case, says: “The question here involved does not seem to have been definitely determined in England; why, I am at a loss to know.”<sup>2</sup> He then remarks that there have been decisions there imposing liability against the reasons by him expressed in the case before him, but in none of them was the question of proximate and remote cause of the injury discussed.

Thus, when we consider that this ruling of Chief Justice THOMPSON was made as recently as 1870, we may well rely upon it, we think, as, at least for the present, the approved ruling on the subject of remote and proximate cause.

<sup>1</sup> 62 Penn. St. 368. ‘

<sup>2</sup> 62 Penn. St. 369.

## CHAPTER XXXIX.

### RESPONDEAT SUPERIOR.

	Section.		Section.
The general principle . . . . .	1	pany for an act of a contractor's servant . . . . .	4
Not applicable to injuries by servant to servant at common law . . . . .	2	Not applicable to the company as to injuries committed by passengers . . . . .	5
Its application extended by statute . . . . .	3	The rule not applicable to willful and independent act of servant	6
How far applicable to the com-			

**1. The general principle.**—It is a principle well settled in law, that where one receives an injury to person or property, occasioned by the negligence of the servants and employes of a railroad company, committed in the regular course of their employment, the rule "*respondeat superior*" applies, and the company are liable for the injury, if the injured person be not himself guilty of negligence, or in some manner to blame. This, too, whether the act complained of be one of omission or of commission. But to bring a case within the rule, it must occur in the regular course of the servant's employment. Nor does it matter to the contrary that the act be committed in violation of orders, or without the knowledge of the superior, if the transaction occur in the course of the servant's business, duties or employment.<sup>1</sup> And "it is no answer to an action" for such

<sup>1</sup> Philadelphia & Reading R. R. Co. v. Derby, 14 How. 468; Inhabitants of Lowell v. The Boston & Lowell R. R. Co., 23 Pick. 24; Wilton v. Middlesex R. R. Co., 107 Mass. 108; S. C. 125 Mass. 130; Sanford v. The Eighth Avenue R. R. Co., 23 N. Y. 343; Higgins v. The Watervliet Turn. & R. R. Co., 46 N. Y. 23; Jackson v. Second Ave. R. R. Co., 47 N. Y. 274; S. C. 7 Am. R. 448; Bradley v. New York Central R. R. Co., 62 N. Y. 99; 12 Am.

Ry. Rep. 160; Rounds v. Del., Lack. & Western R. R. Co., 64 N. Y. 136; S. C. 3 Hun, 329; Cohen v. Dry Dock, E. B. & R. R. Co., 69 N. Y. 170; S. C. 40 N. Y. Supr. 368; Shea v. Sixth Ave. R. R. Co., 62 N. Y. 180; Day v. Brooklyn City R. R. Co., 12 Hun, 435; Choppin v. New Orleans & Carrollton R. R. Co., 17 La. Ann. 19; Passenger R. R. Co. v. Young, 21 Ohio St. 518; Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Maurer, 21 Ohio St.

injury, say the Supreme Court of the United States—GRIER, Justice—that the “plaintiff was riding for pleasure, or that he was a stockholder in the road, or that he had not paid his toll, or that he was the guest of the defendant.”<sup>1</sup> The duty to carry the party in safety, as against all negligence or misconduct of the carrier’s own servants, is one that does not result alone from the payment of the passage money; it is imposed by law, though the service be gratuitous. The carrier is holden to the greatest possible care and diligence, if the injured person be not in fault, whether the transportation be for pecuniary reward or from other motives.<sup>2</sup> In the case here cited from 14 How-

421; *Aycrigg’s Excr. v. The New York & Erie R. R. Co.*, 1 Vroom (N. J.), 460; *Allender v. Chicago, Rock Island & Pacific R. R. Co.*, 43 Ia. 276, 14 Am. Ry. Rep. 443; *State, use, etc., v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253; *Miller v. Pres., etc., of Burlington & Mo. River R. R. Co.*, 8 Neb. 219, 20 Am. Ry. Rep. 96; *Keokuk Northern Line Packet Co. v. True*, 88 Ill. 608, 21 Am. Ry. Rep. 371; *Tebbutt v. Bristol & E. Ry. Co.*, Law Rep. 6 Q. B. 73; *Poulton v. London & S. W. Ry. Co.*, 2 *Id.* 534; *Indianapolis & Vincennes R. R. Co. v. McClaren*, 62 Ind. 566; *Peeples v. Brunswick & Albany R. R. Co.*, 60 Ga. 281; *Georgia R. R. Co. v. Newsome*, *Id.* 492; *Perkins v. Mo., Kans. & Tex. R. R. Co.*, 55 Mo. 212; *Gillett v. Mo. Valley R. R. Co.*, *Id.* 315. A street car driver is so far engaged in his employment as such in aiding persons on and off the car, that for an injury occurring by his negligence in that respect, the company are liable: *Drew, adm’r, v. Sixth Avenue R. R. Co.*, 26 N. Y. 49. As to what is sufficient evidence to establish the relation of master and servant, so as to render the master liable for the servant’s act, see *Lindsay v. Central R. R. & B. Co.*, 46 Ga. 447; 11 Am. Ry. Rep. 415.

In *Pennsylvania Co. v. Roy*, 102 U. S. 451; S. C. 1 Am. & Eng. R. R. Cas. 225, it was held that, for the purpose of providing safe and suitable cars for the transportation of passengers, sleeping car companies were the agents of railroad companies; and for the fall of a berth, which injures a passenger, the latter are liable. Under the Pennsylvania statute of April 4, 1868 (P. L. 58), providing that for injuries sustained by persons employed on or about a railroad, but not being employes of the company, the right of recovery shall be the same as in case of the injury of an employe, with a *proviso* that the act shall not apply to passengers, it is held that a “route or mail agent” in the employ of the United States is not a passenger within the exception: *Pennsylvania R. R. Co. v. Price*, 96 Penn. St. 256; S. C. 1 Am. & Eng. R. R. Cas. 234.

<sup>1</sup> *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468, 485, 1 Am. R. Way Cases, 126.

<sup>2</sup> *Philadelphia & Reading R. R. Co. v. Derby*, 14 How. 468, 1 Am. R. Way Cases, 109; *Farwell v. The Boston & Worcester R. R. Co.*, 4 Met. 56; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 Conn. 284, 17 Am. Ry. Rep. 263.

ard, the Supreme Court of the United States hold the following language, it being a case of personal injury to a person riding gratuitously on the cars, as a guest of the company, and the injured person being at the same time a stockholder in the company. The court lay down the law as follows: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'"<sup>1</sup>

In *The Inhabitants of Lowell v. The Boston & Lowell Railroad Company*, 23 Pickering, 24, the action grew out of the carelessness, and injury resulting therefrom, of the contractors engaged in constructing the defendant's railroad, in leaving down certain barriers at a deep cut of the road in the city of Lowell. The barriers were placed there to prevent persons falling into the cut, which was made across one of the highways of the city. To facilitate the removal of earth and stone from the cut, the contractors' employes, who had erected the barriers, removed them temporarily, and omitted to replace them. Two persons, using the street in the night time, were precipitated into the cut, and were greatly injured. They sued the city and recovered double damages, which the city was compelled to pay. The city then sued the railroad company for the amount, as also for the costs of suit. It was objected, first, that it was the contractor's liability; but the court held the railroad liable which had employed the contractor to do the work, upon the principle of *respondere superior*.<sup>2</sup> It was also objected that, if liable at all, the company were liable to the persons injured, and not by

<sup>1</sup> *Philadelphia & Reading R. R. Co. v. Derby*, 1 Am. R. Way Cases, 127, 14 How. 468, 486.

<sup>2</sup> But see, *contra*, *McCafferty v. Spuyten Duyvil & Port Morris R. R. Co.*, 61 N. Y. 178; *S. C. 12 Am. Ry. Rep.* 105; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kans. 34, 15 Am. Ry. Rep. 220; *S. C. 22 Kans.* 686; *Wray v. Evans*, 80 Penn. St. 102; *Hass v.*

*Phil. & S. M. S. Co.*, 88 *Id.* 269; *Cunningham v. International R. R. Co.*, 51 Tex. 503. The company may be made liable in trover for the acts of contractors in converting posts to the use of the company, even where they are in exclusive possession: *St. Louis, Vandalia & Terre Haute R. R. Co. v. Kaulbrumer*, 59 Ill. 152; *S. C. 11 Am. Ry. Rep.* 186.

way of indemnity to the city for the amount recovered of it. But the court held the railroad company liable to respond to the city to the same extent to which it was originally liable to the injured persons: that is, for simple damages, and not double; and also not liable for the costs of suit which the city had been compelled to pay. The suit was not defended by the city in behalf of the company, nor at their request. By making payment, instead of submitting to suit, the costs of suit and the double damages would have been avoided. They were not the direct result of the negligence of the railroad company, and therefore the latter were not holden to account for the same.<sup>1</sup>

But the company will not become liable for injuries sustained by laborers in the employ of a contractor, though it furnish implements and materials for the work.<sup>2</sup>

Nor is it any defense (unless it may be in mitigation of damages) that the servant be actuated by a mistake or wrong judgment on his part. The employer or master is still liable. The case of *Higgins v. The Watervliet Turnpike & Railroad Company*, above cited, is one where the conductor used more force than was necessary in expelling a party from the cars, and committed an assault upon the person of the passenger whom he expelled. The court say: "The duty of deciding is cast upon the conductor; he represents the defendant; he may misunderstand or misjudge the facts; he may act unwisely or imprudently, or even recklessly; but the business of preserving order and enforcing the regulations of the company is committed to him, and for his acts in that business the company is responsible." And that it is sufficient to hold the master responsible *civiliter*,

<sup>1</sup> *Lowell v. B. & L. R. R. Co.*, *supra*; *Proprs. of Locks and Canals v. Lowell Horse R. R. Co.*, 109 Mass. 221; *Woburn v. Boston & Lowell R. R. Co.*, *Id.* 233; *City of Portland v. Atlantic & St. Lawrence R. R. Co.*, 66 Me. 485; *Wilson v. City of Watertown*, 3 Hun, 508.

<sup>2</sup> *Central R. R. & Banking Co. v. Grant & O'Hara*, 46 Ga. 417, 11 Am. Ry. Rep. 427. But otherwise if the injury is occasioned by the negligence of the railroad company: *McKnight v. Ia. & Minn. R. R. Const. Co.*, 43

Ia. 406, 14 Am. Ry. Rep. 465; *Cook v. Hannibal & St. Joseph R. R. Co.*, 63 Mo. 397, 20 Am. Ry. Rep. 177; *Ominger v. N. Y. Cent. & H. R. R. Co.*, 6 Thomp. & C. 498. But see *Johnson v. Boston*, 118 Mass. 114. It is for the jury to say, where such laborer engages in a dangerous labor by express orders of a superintendent of the company, whether the danger was apparent, and equally open to the observation of the laborer and the superintendent: *Cook v. H. & St. J. R. R. Co.*, *supra*.

if the wrong act be committed in the business of the master, and within the scope of the servant's employment. And this, too, though contrary to the master's orders.<sup>1</sup>

But for an act clearly outside of the scope of the servant's authority, and committed with violence amounting to criminality, the rule is that the master is not liable, as is said in *Isaacs v. The Third Avenue Railroad Company*;<sup>2</sup> but to bring that case within the principle, we think that, instead of the word "authority," the word "employment" should be used, and if so, then to our mind the ruling in that case is not law. The passenger declined to leave the car whilst it was moving; but standing on the platform, preparatory to leaving, insisted that the car should stop and let her off. To do this was clearly the duty of the conductor, and to have it done was certainly the right of the passenger; but, in defiance of both such duty and right, the conductor thrust her off with such violence,

<sup>1</sup> *Higgins v. The Watervliet Turnpike & R. R. Co.*, 46 N. Y. 23, 26; S. C. 7 Am. R. 293. And see *Sanford v. Eighth Avenue R. R. Co.*, 23 N. Y. 343; *Isaacs v. Third Ave. R. R. Co.*, 47 N. Y. 122; *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180, 12 Am. Ry. Rep. 154; *Bradley v. New York Central R. R. Co.*, 62 N. Y. 99, 12 Am. Ry. Rep. 160; *Rounds v. Delaware, Lack. & Western R. R. Co.*, 64 N. Y. 129; S. C. 3 Hun, 329; *Cohen v. Dry Dock, East Broadway & Battery R. R. Co.*, 69 N. Y. 170, 18 Am. Ry. Rep. 109; *Day v. Brooklyn City R. R. Co.*, 12 Hun, 435; *Columbus, Chi. & Ind. Cent. Ry. Co. v. Powell*, 40 Ind. 37; *Indianapolis & V. R. R. Co. v. McClaren*, 62 Ind. 566; *Miller v. Pres., etc., of Burlington & Mo. River R. R. Co.*, 8 Neb. 219, 20 Am. Ry. Rep. 96; *Travers v. Kansas Pacific Ry. Co.*, 63 Mo. 421, 20 Am. Ry. Rep. 119; *Pennsylvania Co. v. Toomey*, 91 Penn. St. 256; S. C. 1 Am. & Eng. R. R. Cas. 461; *Wilton v. Middlesex R. R. Co.*, 107 Mass. 108; S. C. 125 Mass. 130; *Robinson v. Webb*, 11 Bush, 464; *Peeples v. Brunswick & Albany R. R. Co.*, 60

Ga. 281; *Georgia R. R. Co. v. Newsome*, *Id.* 492; *Chicago, Burlington & Quincy R. R. Co. v. Bryan*, 90 Ill. 126; *Poulton v. London & S. W. Ry. Co.*, Law Rep. 2 Q. B. 534; *Bayley v. Manchester, S. & L. Ry. Co.*, Law Rep. 8 C. P. 148; S. C. 7 *Id.* 415. It is a question for the jury whether the act of the servant was with a view to injure plaintiff, or to his master's service: *Cohen v. D. D., E. B. & B. R. R. Co.*, *supra*. And in such case there need be no allegation or proof of a conductor's authority in this regard. The court will take judicial notice of his duty: *Travers v. K. P. Ry. Co.*, *supra*.

<sup>2</sup> 47 N. Y. 122; *Rounds v. Delaware, Lack. & Western R. R. Co.*, 64 N. Y. 129; *Stewart v. Brooklyn Cross-town R. R. Co.*, 9 Repr. 759; *Edwards v. London & N. W. Ry. Co.*, Law Rep. 5 C. P. 445; *Walker v. South Eastern Ry. Co.*, *Id.* 640; *Allen v. London & S. W. Ry. Co.*, L. R. 6 Q. B. 65; *Hoar v. Me. Cent. R. R. Co.*, 70 Me. 65; *Chicago & Northwestern Ry. Co. v. Bayfield*, 37 Mich. 205.

whilst the car was moving on, as to throw the passenger off, clear of the car steps, and onto the pavement. The court held the company not civilly liable, basing its escape upon the enormity of the outrage, outside of which was a clear omission to perform the duty of stopping and allowing (indeed assisting, if need be) the woman to pass peacefully and safely from the car.<sup>1</sup>

Whilst fully recognizing the correctness of the rule that for a criminal or malicious act of the servant, unconnected with the discharge of his duties, and in no wise within the scope of his employment, the master is not liable, yet we are unable to regard the case cited from New York, of *Isaacs v. The Third Avenue R. R. Co.*, as coming within the rule. To our mind it were as reasonable to say the conductor may enter the car and empty it of all passengers by violence—and this, too, whilst it is yet moving on, and without any provocation except declining to leave while the car is thus moving—and that the master will be exempt, because the servant was not employed to do such acts, as to hold exemption of the master to follow the occurrence involved in the case of *Isaacs v. The Third Avenue Railroad Company*. In principle there can be no difference whether the passenger be thrust out of or off the car, or whether the violence be to an unprotected and unoffending woman, or to a car full of men, except that the outrage on the woman is the greater because she is a woman. It was the duty of the conductor to stop, and see her safely off.

The more reasonable rule is the one laid down in Massachusetts and in Maine, where it is settled that a railroad company is liable to the same extent as an individual would be, for an injury done by its servant in the course of his employment;<sup>2</sup> and that if the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent;<sup>3</sup> or even if contrary to express or-

<sup>1</sup> *Isaacs v. Third Avenue R. R. Co.*, 47 N. Y. 122. See, also, *Allegheny Valley R. R. Co. v. McLain*, 91 Penn. St. 442; S. C. 1 Am. & Eng. R. R. Cas. 464. This was an action of trespass *vi et armis*, and citing Philadelphia, Germantown & Norristown R. R. Co. v. Wilt, 4 Whart. 143; Yerger v. Warren, 7 Casey (31 Penn. St.), 319.

<sup>2</sup> *Hewett v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Allen, 580; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; *Monument Nat. Bk. v. Globe Works*, 101 Mass. 59; *Ramsden v. The Boston & Albany R. R. Co.*, 104 Mass. 117; *Miller v. Pres.*, etc., *supra*.

<sup>3</sup> *Howe v. Newmarch*, 12 Allen, 49; *Ramsden v. Boston & Albany R. R.*

ders.<sup>1</sup> And if, in the exercise of his general discretionary authority, he wrongfully eject a passenger who has paid the fare, or uses excessive and unjustifiable violence or force in ejecting one who has not and will not pay the fare, and injures such passenger by so doing, or compels him to get off whilst the train is in motion, the company is liable.<sup>2</sup>

In the case cited from 104 Mass., *Ramsden v. Boston & Albany Railroad Company*, the Supreme Court of Massachusetts say: "Neither the corporation nor the conductor has any more lawful authority to needlessly kick a passenger or make him jump from the cars when in motion, than to wrest from the hands of a passenger an article of apparel or personal use, for the purpose of compelling the payment of fare. Either is an unlawful assault; but if committed in the exercise of the general power vested by the corporation in the conductor, the corporation, as well as the conductor, is liable to the party injured."<sup>3</sup>

And it matters not whether the servant inflicting the injury be the regular one employed as conductor at the time, or whether it be a mere brakeman, detailed to act as conductor for the time being.<sup>4</sup> Neither the one nor the other may assault, beat or oth-

Co., 104 Mass. 117; S. C. 6 Am. R. 200; *Goddard v. Grand Trunk R. W. Co.*, 57 Maine, 202; *Shea v. Sixth Ave. R. R. Co.*, 62 N. Y. 180, 12 Am. Ry. Rep. 154.

<sup>1</sup> *Phila. & Reading R. R. Co. v. Derby*, 14 How. 468; *Ramsden v. Boston & Albany R. R. Co.*, 104 Mass. 117. And for the purpose of showing the act of a servant to be contrary to the rules of the company, and thus fastening negligence upon the company, a book containing such rules is admissible in evidence: *Hobbs v. Eastern R. R. Co.*, 66 Me. 572, 19 Am. Ry. Rep. 210.

<sup>2</sup> *O'Brien v. Boston & Worcester R. R. Co.*, 15 Gray, 20; *Ramsden v. The Boston & Albany R. R. Co.*, 104 Mass. 117; *Shea v. 6th Ave. R. R. Co.*, *supra*; *Peck v. N. Y. Cent. & Hudson River R. R. Co.*, 70 N. Y. 587, 19 Am. Ry. Rep. 1; *Penn. Co. v. Toomey*, *supra*.

<sup>3</sup> 104 Mass. 117, 6 Am. R. 200, 202.

In the case here cited a controversy arose between the conductor and a lady passenger as to whether she had paid her fare, in the course of which he demanded her parasol as security for payment of the fare, and she declining to surrender it, he took hold of it, and after a struggle took it away from her. See also, to the same effect, *Goddard v. The Grand Trunk R. W. Co.*, 57 Maine, 202; *Gasway v. Atlanta & West Point R. R. Co.*, 58 Ga. 216, 16 Am. Ry. Rep. 99; *Rounds v. Delaware, Lack. & Western R. R. Co.*, 64 N. Y. 129; S. C. 3 Hun, 329; *Walker v. South Eastern Ry. Co.*, Law Rep. 5 C. P. 640.

<sup>4</sup> *Goddard v. The Grand Trunk R. W. Co.*, 57 Maine, 202; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; *Milwaukee & Miss. R. R. Co. v. Finney*, 10 Wis. 388. But the company will not be liable for the negligence of a servant in employing an assistant, nor for the



erwise wantonly outrage, under color of his authority, a peaceable passenger, in relation to the non-payment of fare, or in reference to a disagreement as to whether the fare has in fact been paid by a passenger.<sup>1</sup> And if either do so, the company will not only be held liable for the wrong act of its servant in that respect,<sup>2</sup> but the case, as it may be more or less aggravated in its nature, may be a fit subject for punitive damages; and more especially so if afterward the company, on full information of the circumstances, continue to retain the obnoxious servant in its employ, thereby seeming to approbate his acts.<sup>3</sup>

There is an implied obligation and contract resting upon a carrier of passengers to exercise the highest degree of care to make the passage comfortable and safe; an obligation which the policy of the law will not allow the parties to relax by even a positive agreement.<sup>4</sup> "If (say the court, in *Goddard v. The Grand Trunk Railway Co.*) the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for

negligence of such assistant when so employed, if the servant so employing an assistant had no authority so to do: *Jewell v. Grand Trunk Ry. Co.*, 55 N. H. 84, 11 Am. Ry. Rep. 496.

<sup>1</sup>*Goddard v. The Grand Trunk R. W. Co.*, 57 Maine, 202; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465.

<sup>2</sup>*Goddard v. Grand Trunk R. W. Co.*, 57 Maine, 202; *Moore v. Fitchburg R. R. Co.*, 4 Gray, 465; *Milwaukee & Miss. R. R. Co. v. Finney*, 10 Wis. 388; *Penn. R. R. Co. v. Vandiver*, 42 Penn. St. 365; *Weed v. Panama R. R. Co.*, 17 N. Y. 362; *Phila. & Reading R. R. Co. v. Derby*, 14 How. 468; *Landreaux v. Bell*, 5 La. (O. S.), 434; *Chamberlain v. Chandler*, 3 Mason, C. C. R., 242; *Nieto v. Clark*, 1 Clifford, C. C. R., 145; *Balt. & Ohio R. R. Co. v. Blocher*, 27 Md. 277; *Travers v. Kansas Pacific Ry. Co.*, 63 Mo. 421, 20 Am. Ry. Rep. 119. In the case of

*Landreaux v. Bell*, *supra*, the rule is laid down that a carrier is responsible for the misconduct of the servant towards a passenger, in regard to wrongful acts of commission, to the same extent as for misconduct in regard to merchandise committed to the care of the company—not the same extent as insurers, but the same extent as the company's servant should wantonly injure such property.

<sup>3</sup>*Goddard v. The Grand Trunk R. W. Co.*, 57 Maine, 202, 218; *Day v. Woodworth*, 13 How. 363; *New Orleans, J. & G. N. R. R. Co. v. Hurst*, 36 Miss. 660; *Hopkins v. Atlantic & St. Lawrence R. R. Co.*, 36 N. H. 9; *Gasway v. Atlantic & West Point R. R. Co.*, 58 Ga. 216, 16 Am. Ry. Rep. 99; *Travers v. K. P. Ry. Co.*, *supra*.

<sup>4</sup>*Goddard v. Grand Trunk R. W. Co.*, 57 Maine, 202, 217.

the damage he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages."<sup>1</sup>

The ruling in Illinois is, that if an agent or servant of a railroad company, while engaged in the discharge of his duty, uses the appliances or means he has control of in an unskillful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he willfully perverts such agencies to the purpose of wanton mischief or injury, the company must respond in damages. "They will not be permitted to say, it is true he was an agent, was authorized by us to have the possession of our engines, was engaged in carrying on our business, and while so engaged, he willfully perverted the instruments which we placed in his hands to something more than we designed or authorized, and, therefore, we should not be liable for the injury thus inflicted."<sup>2</sup>

It is no defense to an action brought against the company for the negligence of the servant, to show that the act from which the injury resulted was unauthorized by the charter, if the corporation has clearly recognized the act as a part of its business, as by employing servants to superintend it, or receiving the profits of it.<sup>3</sup> Nor does the fact that the state is the sole owner of the road constitute a defense.<sup>4</sup>

A different rule prevails in New York with regard to the liability of a railroad company for the acts of contractors employed in constructing the road, than that before stated. In that state it is held that if the company has no immediate control over the

<sup>1</sup> 57 Maine, 217, 218.

<sup>2</sup> Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298, 308; Chicago, Burlington & Quincy R. R. Co. v. Dickson, 63 Ill. 151, 7 Am. Ry. Rep. 45; Phil., Wilm. & Balt. R. R. Co. v. Stinger, 78 Penn. St. 219; Phil. & Reading R. R. Co. v. Killips, 88 Id.

405; Georgia R. R. Co. v. Newsome, 60 Ga. 492.

<sup>3</sup> Hutchinson v. Western & Atlantic R. R. Co., 6 Heisk. 634, 12 Am. Ry. Rep. 16; South & N. Ala. R. R. Co. v. Chappell, 61 Ala. 527; National Bank v. Graham, 100 U. S. 699.

<sup>4</sup> *Ibid.*

contractor, it will not be liable for his negligent acts causing injury to others.<sup>1</sup> It is said the true rule is that this liability does not arise unless the one sought to be charged is an employer, strictly speaking, or where the nature of the work authorized to be done would necessarily result in the injury, or where the injury results from the omission of duty by the company.<sup>2</sup> And the owner of real estate is held to no stricter rule in respect thereto than the owner of personal property.<sup>3</sup>

**2. Not applicable to injuries by servant to servant, at common law.**—It is a principle of the common law, that where two or more persons are employed by the same principal, in a common enterprise, no action can be sustained against their employer, on account of injury incurred or suffered by one or more of them through the negligence of any other one or more of such fellow servants. It therefore follows that a servant or employe of a railroad company, who is injured through the negligence of a fellow servant or employe, in the course of their business and common employment, can not ordinarily maintain an action at common law against the company for such injury.<sup>4</sup>

<sup>1</sup> *McCafferty v. Spuyten Duyvil & Port Morris R. R. Co.*, 61 N. Y. 178, 12 Am. Ry. Rep. 105.

<sup>2</sup> *McCafferty v. S. D. & P. M. R. R. Co.*, *supra*.

<sup>3</sup> *McCafferty v. S. D. & P. M. R. R. Co.*, *supra*. Where there is a question whether the employe whose acts caused the injury is the servant of one company or another, the company employing and paying him, and whose orders he is bound to obey, is held liable: *Coggin v. Cent. R. R. Co.*, 62 Ga. 685.

<sup>4</sup> *Sullivan v. The Mississippi & Missouri R. R. Co.*, 11 Iowa, 421, 423; *Kroy v. The Chi., Rock Island & P. R. R. Co.*, 32 Iowa, 357, 360; *Farwell v. The Boston & Worcester R. R. Co.*, 4 Met. 49, 1 Am. R. W. Cases, 339; *Hayes v. Western R. R. Co.*, 3 Cush. 270; *King v. Boston & Worcester R. R. Co.*, 9 Cush. 112; *Coon v. Syracuse & Utica R. R. Co.*, 1 Seld. (5 N. Y.), 492; *Madison & I. R. R. Co. v. Bacon*, 6 Ind. (Porter), 205; *Sullivan v.*

*Toledo, Wabash & Western Ry. Co.*, 58 Ind. 26; *Honner v. The Ill. Cent. R. R. Co.*, 15 Ill. 550; *Chicago & Alton R. R. Co. v. Murphy*, 53 Ill. 336; S. C. 5 Am. R. 48; *Toledo, Wabash & Western Ry. Co. v. Durkin*, 76 Ill. 395; *Chicago & N. W. R. R. Co. v. Scheuring*, 4 Bradw. (Ill.), 533; *Murray v. The So. Car. R. R. Co.*, 1 McMullan, 385; *Whaalan v. The Mad River & Lake Erie R. R. Co.*, 8 Ohio St. R. 249; *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589; *Hanrathy v. Northern Central Ry. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188; *Robinson v. H. & T. Cent. Ry. Co.*, 46 Tex. 540, 13 Am. Ry. Rep. 303; *Hardy v. Carolina Central Ry. Co.*, 76 N. Car. 5, 14 Am. Ry. Rep. 309; *Mulherrin v. Delaware, Lackawanna & Western R. R. Co.*, 81 Penn. St. 366, 15 Am. Ry. Rep. 456; *Osborne v. Knox & Lincoln R. R. Co.*, 68 Me. 49, 19 Am. Ry. Rep. 7; *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60; *Ragsdale v. Memphis*

And in Missouri it is held that Sec. 2 of the "Damage Act" of that state (Wagner's Stat., p. 519), which gives a right of action against a railroad company "whenever any person shall die from any injury resulting from, or occasioned by, the negligence, unskillfulness or criminal intent of any officer, agent, servant or employe," does not alter the common law rule in this respect.<sup>1</sup>

Where there is a conflict in the evidence, the question in whose employment the injured person was at the time of the injury should be left to the jury.<sup>2</sup>

And it does not matter to the contrary, that the servants are employed in different departments or duties, if the employment be in the same business enterprise, and by the same master. Thus, it is expressly holden that the duties of switchman and engineer, on the same road, though different and independent of each other, and discharged necessarily by persons having no control over each other, or one over the other, are of

& Charleston R. R. Co., 59 Tenn. 426, 20 Am. Ry. Rep. 182; Colorado Cent. R. R. Co. v. Ogden, 3 Col. 499; Summerhays v. Kansas Pacific Ry. Co., 2 Col. 484, 20 Am. Ry. Rep. 359; Hough v. Tex. & Pacific Ry. Co., 100 U. S. 213, 21 Am. Ry. Rep. 451; Hogan v. Cent. Pac. R. R. Co., 49 Cal. 128; Mobile & M. Ry. Co. v. Smith, 59 Ala. 245. But as to one hired merely by the day, and not in service on the day and at the time of the injury, then the rule does not apply, and the action lies as in injuries to others generally: Balt. & Ohio R. R. Co. v. The State, 33 Md. 542. And so a servant may recover against the company if injured without his own fault by reason of a car being unfit for service, and the road blocked by ice, negligently allowed to remain: Fifield v. Northern R. R. Co., 42 N. H. 225. And it matters not in what the negligence of the co-servant consists, whether in want of care in the prosecution of his department of the common business, or in failing to report the defective

condition of machinery: Hanrathy v. N. C. Ry. Co., *supra*. The rule applies to one voluntarily assisting a servant of the company in an emergency: Osborne v. K. & L. R. R. Co., *supra*. But where an employe is injured partly through the contributory negligence of a co-servant, but mainly by reason of the defective condition of the track, a recovery may be had: Stetler v. Chicago & Northwestern Ry. Co., 49 Wis. 609; S. C. 6 N. W. Repr. 303, 21 Am. Ry. Rep. 89; S. C. (on former appeal), 46 Wis. 497.

<sup>1</sup> Proctor v. Hannibal & St. Joseph R. R. Co., 64 Mo. 112; S. C. 9 Am. Ry. Rep. 440. And see Louisville & Nashville R. R. Co. v. Robertson, 9 Heisk. 276, 20 Am. Ry. Rep. 9.

<sup>2</sup> Shultz v. Chicago, Milwaukee & St. Paul Ry. Co., 40 Wis. 589, 13 Am. Ry. Rep. 453. And so of the question of co-servants: Mullan v. Phil. & S. M. Steamship Co., 78 Penn. St. 25; Hass v. Same, 88 *Id.* 269; Holton v. Daly, 4 Bradw. (Ill.), 25.

such character as to come within the rule of law which prevents a recovery against their common master or employer for an injury received by either from the negligence or want of care of the other, when the road is being operated and exclusively controlled by such employer.<sup>1</sup>

When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and receive their compensation from the same source, then the nearness or distance from each other of the persons causing or receiving the injury may not enter into the question as to the master's liability. The exemption of the master from liability is not based so much upon the better means of the servant of caring for his safety when employed in immediate connection with those from whose negligence he suffers, nor upon the better means thereby of observing the fitness of such fellow servant for the performance of the duties committed to his charge, but for the reason that the "implied contract" of the employer to indemnify the servant for injuries, does not extend further than for the negligence of himself.<sup>2</sup>

In the *Chicago & Alton Railroad Company v. Murphy*, the Supreme Court of Illinois, LAWRENCE, Justice, lay down the rule as to the relative employment of servants which will exempt the company from liability for injuries received by one, by reason of the negligence of another, to be this: That their ordinary occupations in their service bear such relations to each other, that the careless or negligent conduct of one may endanger the safety of the other; that then such danger is incident to their employment, and that if one be injured by the negligence of the other, no recovery can be had for the injury; and that such relationship of the service is a question of fact for the decision of a jury. The court say: "When the ordinary duties and occupations of the servants of a common master are such that one

<sup>1</sup> *Memphis & Charleston R. R. Co. v. Thomas*, 51 Miss. 637; *Farwell v. The Boston & Worcester R. R. Co.*, 4 Met. 49; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; *Walker v. Boston & Maine R. R. Co.*, 123 Mass. 8; S. C. 1 Am. & Eng. R. R. Cas. 141. But it is otherwise in Tenn.: *Nashville & Chattanooga R. R. Co.*, and *M. & C.*

*R. R. Co., v. Carroll*, 6 Heisk. 347, 12 Am. Ry. Rep. 20; *Nashville & Decatur R. R. Co. v. Jones*, 9 *Id.* 27, 19 Am. Ry. Rep. 261; *Louisville & Nashville R. R. Co. v. Bowler*, *Id.* 866, 20 Am. Ry. Rep. 65.

<sup>2</sup> *Farwell v. The Boston & Worcester R. R. Co.*, 4 Met. 49.

is necessarily exposed to hazard by the carelessness of another, they must be supposed to have voluntarily taken the risks of such possible carelessness when they entered the service, and must be regarded as fellow servants, within the meaning of this rule."<sup>1</sup> The fact that one of such servants may receive his orders from one source, and the other one of such servants receives his orders from another and different source, will not alter the case so as to render the company liable, if they be fellow servants of a common master, working at the time of the injury at the same place where it occurs, or to subserve the same interests, and with their occupations so related to each other that their safety necessarily depends, in a greater or less degree, upon the carefulness of each other. In such cases they are presumed to have known of the relative dangers liable to arise in the course of their employment, and to have contracted their engagements accordingly.<sup>2</sup>

Such is not only the settled American, but also English, authority on the subject, apart from the statutory regulations adopted to the contrary. The only American case with which we have met tending to a contrary rule, is that of the *Little Miami Railroad Company v. Stevens*;<sup>3</sup> but which, upon a close examination, rather avoids than overrides the rule. The decision there goes mainly upon the principle or supposed fact of the case, that the company, in its aggregate superior capacity, was negligent itself, directly, in not informing its engineer of a change of place of the passing of trains upon the road. In that case, a divided court held the imputed omission to have been that of the company itself, and not that of an ordinary servant. This case is nowhere recognized, that we have seen, as changing the rule laid down in the original text hereof.

It is well settled that a corporation can not act personally; that it requires some person to superintend structures, purchase and control cars, employ and discharge men, and provide all the needful appliances. This can only be done by agents. When the directors themselves act as such agents, they, as the executive head, represent the corporation. When they devolve those duties

<sup>1</sup> 53 Ill. 336, 339, 340; S. C. 5 Am. R. 48 and 50.

<sup>2</sup> *Chi. & Alton R. R. Co. v. Murphy*, 53 Ill. 336.

<sup>3</sup> 20 Ohio, 415. See *Cleveland, Columbus & Cin. R. R. Co. v. Keary*, 3 Ohio St. 201; *Burke v. Norwich & Worcester R. R. Co.*, 34 Conn. 474.

of executive head, in reference to any portion of their duties, upon some one else appointed to perform them, then such appointee in that particular matter, equally as much so as if done by themselves, represents the corporation; and though in doing so he may be, and is, a servant of the corporation, inasmuch as he serves it, yet he is not in these respects a fellow-servant, co-laborer or co-employee, in the common acceptation of these terms, although he may labor with and like others who are to each other co-laborers. In this respect he is head; he is master. Thus, when he employs servants, makes selections of machinery, tools and other appliances, then his acts are executive, and are those of a master, and the company whom he represents are such master in a legal point of view, and are responsible that he shall act with a reasonable degree of care for the safety and life of those under his or their employ. His executive acts are the acts of the company; his negligence is their negligence; his control is their control; in this he has no equal, and is not in this respect the mere equal of the common laborer or servant, as a co-laborer or servant. Therefore, his neglect is not the negligence of a co-servant, co-laborer or co-employee, and the doctrine, though well established and highly proper in its place, which protects the company or master from responsibility for injuries resulting to a servant or employee from the negligence of his fellow-servant or employee, does not apply.<sup>1</sup>

And in selecting agents and servants, railroad companies are bound to the exercise of diligence and care, that they employ or retain in their service, in its different departments, only such persons as are safe, capable and trustworthy. They are not absolutely bound that their servants shall be such, but are bound

<sup>1</sup> *Brickner v. The New York Cent. R. R. Co.*, 2 Lans. 506; *Wright v. New York Cent. R. R. Co.*, 25 N. Y. 565; *Warner v. The Erie Ry. Co.*, 39 N. Y. 471; *Fuller v. Jewett*, 80 N. Y. 46; S. C. 1 Am. & Eng. R. R. Cas. 109; *McDermott v. Pacific R. R. Co.*, 30 Mo. 115; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Harper v. The Indianapolis & St. Louis R. R. Co.*, 47 Mo. 567; S. C. 4 Am. R. 353;

*Snow v. The Housatonic R. R. Co.*, 8 Allen, 444; *Gilman v. The Eastern R. R. Co.*, 10 Allen, 233; *Noyes v. Smith*, 28 Vt. 63; *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 564; Ill. Cent. R. R. Co. v. *Jewell*, 46 Ill. 99; Ill. Cent. R. R. Co. v. *Welch*, 52 Ill. 183; S. C. 4 Am. R. 593; *Chicago, Burlington & Quincy R. R. Co. v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich. 510.

to diligence and care in endeavoring to obtain such; and mere ignorance of the unworthiness or unfitness is no excuse, if, by proper diligence and care, such unsuitableness might have been known to the company, that is, to those managing that portion of its executive or administrative affairs.<sup>1</sup>

But if also known to the injured employe, and he still continue to retain his employment as a co-servant, co-employe or laborer of such unfit fellow-servant, without objection, then such knowledge on his part, and continued exposure to the dangers of co-service with such unfit employe, will prevent a recovery for injuries occasioned by the negligence of the person thus known to be unfit for his place, unless such continued service of the injured servant arise from promises held out by the company of displacing such unfit person. Where both parties have equal knowledge, or means of knowledge, and the servant continues, this rule applies.<sup>2</sup>

In *Mad River & Lake Erie Railroad Company v. Barber*, the Supreme Court of Ohio say: "The duty imposed on the company by the relation occupied by the conductor, was to use reasonable and ordinary care and diligence in furnishing him with sufficient, sound and safe cars and machinery for the train. This duty required not only that the company should use proper skill and diligence in procuring and furnishing sufficient and safe cars and machinery, but also when notified that they had become insufficient and unsafe, or when they had been in use as long as they could with safety be used, to take them off the road until repaired and made sufficient and safe. And for any injury sustained by an agent or employe of the company, from any neglect of this duty, the company would be liable. But the relation occupied by the agent or employe imposes a reciprocal

<sup>1</sup>*Gibson v. The Pacific R. R. Co.*, 46 Mo. 163; *Harper v. The Indianapolis & St. Louis R. R. Co.*, 47 Mo. 567; S. C. 4 Am. R. 353; *Moss v. Pacific R. R. Co.*, 49 Mo. 167; *Gilman v. The Eastern R. R. Co.*, 10 Allen, 233; *Summerhays v. Kansas Pacific Ry. Co.*, 2 Col. 484, 20 Am. Ry. Rep. 359.

<sup>2</sup>*Davis v. The Detroit & Milwaukee R. R. Co.*, 20 Mich. 105; S. C. 4 Am. R. 364; *Mad River & Lake Erie R. R.*

*Co. v. Barber*, 5 Ohio St. 564; *The Indianapolis & Cin. R. R. Co. v. Love*, 10 Ind. 556; *Thayer v. St. Louis, Alton & T. H. R. R. Co.*, 22 Ind. 29; *Kroy, admr., v. Chi., R. Island & P. R. R. Co.*, 32 Iowa, 357; *Greenleaf v. Dubuque & Sioux City R. R. Co.*, 33 Iowa, 52; *Devitt v. Pacific R. R. Co.*, 50 Mo. 302; *Summerhays v. K. P. Ry. Co.*, *supra*.



duty upon him." And that "if he knew of the defects and insufficiency of the cars or machinery, and without taking the necessary and proper precaution to guard against danger, continued to use them, he took upon himself the risk, and waived his right as against the company."<sup>1</sup>

So in the case cited from 52 Illinois, *Illinois Central Railroad Company v. Welch*, which was an action for injuries received as a brakeman on a train of said company, by striking against a projecting awning as the train was moving, it appeared from the evidence that the company was informed of the dangerous projection, and had failed to remove it, and that the plaintiff was not informed of such structure and danger, having been accustomed to pass there (except two trips) in the night. It was holden that the company were liable. In this case the court reaffirmed the doctrine of *Chicago & Northwestern R. R. Co. v. Swett*, 45 Ill. 201, as to the obligation of the company to furnish safe materials and structures, and to properly construct its road, with all its necessary appurtenances, and keep the same in proper repair.<sup>2</sup>

But if a road be owned and controlled by one set of proprietors, whose duty it be to keep it in repair and in fit condition at all times for passing trains owned by another set of proprietors paying toll for the use thereof, so that the switch tender be the employe and servant of the one party, and the engineer the employe of the other party, then they are as strangers to each other, as has been intimated by a learned jurist, and under such circumstances the authorities are inclined to favor a recovery for an injury received by one of them by reason of the negligence of the other.<sup>3</sup>

<sup>1</sup> 5 Ohio St. 564, 565. And see *Davis v. Detroit & Milwaukee R. R. Co.*, 20 Mich. 105; *S. C. 4 Am. R.* 364, 375; *Devitt v. Pacific R. R. Co.*, 50 Mo. 302.

<sup>2</sup> *Illinois Cent. R. R. Co. v. Welch*, 52 Ill. 183; *S. C. 4 Am. R.* 593. See *Chicago, Burlington & Quincy R. R. Co. v. Gregory*, 58 Ill. 272; *Chicago & Ia. R. R. Co. v. Russell*, 91 Ill. 298; *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583.

<sup>3</sup> *Farwell v. The Boston & Worcester R. R. Co.*, 4 Met. 49. And see *Swainson v. North Eastern Ry. Co.*, *Law Rep. 3 Exch. Div.* 341, 18 *Am. Ry. Rep.* 569; *Warburton v. Great Western Ry. Co.*, *Law Rep. 2 Exch.* 30. These latter were cases of connecting roads using the same depots or junctions, but employing different servants. But one company is not liable to its servant for the negligence of the servants of another company using

So the ordinary duties of an employe or servant of a railroad company may be so separate and distinct from the business of running its trains, or occupation thereon, that he will be able to maintain an action for injury received as a passenger on the road, as in case of other passengers, as has been holden; for instance, in case of a mere book-keeper in the office of a railway, who was injured whilst a passenger on one of the trains of the company by whom he was employed; for in such cases the relationship of relative service no longer exists, but the party injured stands for the time being in the relation of a passenger.<sup>1</sup>

And in case the injury occur whilst the servant is employed, by order of his superior, in a different duty and relative employment, and more especially in a more hazardous one than that contemplated ordinarily by the nature of his engagement, then the reason of the rule no longer exists, and neither does the exemption; for in such case the servant is not presumed to have contracted his engagement with reference to the danger to which he is thus exposed in discharging the duties of a different branch of the business than that for which he was employed. Therefore, if injured from negligence, and without fault on his part, when thus discharging duties not within the line of his ordinary and originally contemplated employment, he may recover, although the negligence be that of a fellow servant.<sup>2</sup>

its road: *Clark v. C., B. & Q. R. R. Co.*, 92 Ill. 43; *Chi., B. & Q. R. R. Co. v. Clark*, 2 Bradw. (Ill.), 596.

<sup>1</sup> *Chi. & Alton R. R. Co. v. Keefe*, 47 Ill. 108; *Chi. & Alton R. R. Co. v. Murphy*, 53 Ill. 336; *S. C. 5 Am. R.* 48; *Manville v. Cleveland & Toledo R. R. Co.*, 11 Ohio St. 424.

<sup>2</sup> *Lalor v. Chi., Burlington & Quincy R. R. Co.*, 52 Ill. 401; *Union Pac. R. R. Co. v. Fort*, 17 Wall. 553; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Hurst v. Chi., R. I. & P. R. R. Co.*, 49 Ia. 76; *Mann v. Oriental Print Works*, 11 R. I. 152. But see *Hanrathy v. Northern Central Ry. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188, in which a distinction is made where the servant voluntarily undertook such other employment; and *Hawley v.*

*Northern Cent. Ry. Co.*, 17 Hun, 115; *Davis v. Detroit & Milw. R. R. Co.*, 20 Mich. 105. The rule that a master is not liable for injuries sustained by one servant through the negligence of another servant, does not apply where the servant at the time of the injury is not acting in the service of the master: *Washburn v. Nashville & Chattanooga R. R. Co.*, 3 Head, 638; *Hutchinson v. York, N. & B. Ry. Co.*, 5 Exch. 343; *Tunney v. Midland Ry. Co.*, L. R. 1 C. P. 291. But where a conductor engages in coupling and uncoupling voluntarily, he is outside of his duty and at fault, unless there be a pressing emergency: *Central R. R. & Banking Co. v. Sears*, 59 Ga. 436, 18 Am. Ry. Rep. 100. But if the conductor in good faith be-

It is error to charge the jury that "when a party contracts to perform a service which from its very nature is attended with more than ordinary risk, he must take the consequences himself, and can only look to his employers when the latter, through itself or agents, has unnecessarily, improperly, or in an unusual manner, exposed him to danger that ought to have been avoided." The questions to be submitted to the jury are the fault of the plaintiff and the negligence of the company, without regard to the nature of the business. If the business is very dangerous, the duty rests upon both parties to use the more care and diligence, and their duties are equal.<sup>1</sup> And when the plaintiff, by reason of the imperfect condition of his hands, is unfitted to perform the duty with which he is entrusted, this will not affect the question of the fault or negligence of either party. The company should notice such defect before employing the servant.<sup>2</sup> The presumption of law that the plaintiff, being an employe, is without fault, only arises when he is engaged in employment wholly disconnected with the particular business in which he is injured.<sup>3</sup>

lieved such emergency to exist, then he will not be at fault: *Ibid.* But even then he must not act recklessly or imprudently, and it is a question for the jury whether he has: *Ibid.*

<sup>1</sup>Central R. R. & Banking Co. v. Kelly, 58 Ga. 107, 16 Am. Ry. Rep. 114; Chicago & N. W. Ry. Co. v. Moranda, 93 Ill. 302. But see Schultz v. Chicago & Northwestern R. R. Co., 44 Wis. 638, 18 Am. Ry. Rep. 146; Valtez v. Ohio & Miss. Ry. Co., 85 Ill. 500; Toledo, Wabash & Western Ry. Co. v. Black, 88 Ill. 112, 21 Am. Ry. Rep. 290; Mich. Cent. R. R. Co. v. Smithson, 45 Mich. 212, 1 Am. & Eng. R. R. Cas. 101; McAndrews v. Burns, 10 Vroom, 117; Mullan v. Phil. & S. M. S. Co., 78 Penn. St. 25; Cumberland & Penn. R. R. Co. v. State, 44 Md. 283.

<sup>2</sup>Central R. R. & B. Co. v. Kelly, *supra*. And so where the employe is an infant, he can be held to no higher degree of intelligence than his youth

will warrant: O'Connor v. Adams, 120 Mass. 427; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; St. Louis & South Eastern Ry. Co. v. Valirius, 56 Ind. 511, 18 Am. Ry. Rep. 116; Hill v. Gust, 55 Ind. 45; Dowling v. Allen, 6 Mo. App. 195; Bridges v. St. Louis, Iron Mountain & Southern R. R. Co., *Id.* 389. It is gross negligence in the company to employ such person, unless he is informed as to the dangerous character of the business, and instructed how to avoid it: St. L. & S. E. Ry. Co. v. Valirius, *supra*. But the rule precluding a recovery for injuries occasioned by the negligence of a fellow servant, applies to minors: DeGraff v. N. Y. Cent. & H. R. R. Co., 76 N. Y. 125, 3 Thomp. & C. 255; Sullivan v. Toledo, Wabash & Western Ry. Co., 58 Ind. 26; Houston & Great Northern R. R. Co. v. Miller, 51 Tex. 270.

<sup>3</sup>Central R. R. & B. Co. v. Kelly,

A railroad company may make reasonable rules to regulate the conduct of its employes. Whether the rule be reasonable, involves the question of power to make it, and must therefore be determined by the court; but whether it is adequate for the safety of others, and the management of trains, is a question for the jury.<sup>1</sup> And where a time schedule is furnished to conductors and engineers, it is a breach of orders to vary therefrom, and to enter upon a trip at any other time, unless by express orders from some general officer of the road.<sup>2</sup> The engineer can not excuse himself for a violation of such schedule by setting up an order from the conductor.<sup>3</sup> The burden of proof is on the employe to establish that the violation of a rule by him did not contribute to the injury. Of course, if the violation of rules did not contribute to the injury, it will not defeat a recovery. As where an engineer violated a rule of the company by permitting another engineer to ride upon the engine with him, and it appeared such violation of the rule had no connection with the injury, it was held no defense.<sup>4</sup>

**3. Its application extended by statute.**—At common law, the doctrine of *respondet superior* does not apply to cases of injuries to a servant caused by the negligence of a co-servant of the injured person in a common employment; but by statute, in many of the states, this rule is abolished as to railroad corporations and their servants, and these corporate bodies are held liable for such injuries, subject to such defenses of contributive negligence, comparative negligence, or other defense in law, as would be available in like cases of injuries and actions wherein the question as to co-servants is not involved. Such enactments are held valid.<sup>5</sup>

*supra*; Same *v.* Sears, 59 Ga. 436, 18 Am. Ry. Rep. 100.

<sup>1</sup> Chicago, Burlington & Quincy R. Co. *v.* McLallen, 84 Ill. 109, 16 Am. Ry. Rep. 425.

<sup>2</sup> Georgia R. R. & Banking Co. *v.* McDade, 59 Ga. 73, 18 Am. Ry. Rep. 183; Wolsey *v.* Lake Shore & Mich. Southern R. R. Co., 33 Ohio St. 227; Lyon *v.* Detroit, L. & L. M. R. R. Co., 31 Mich. 429; Shanny *v.* Androscoggin Mills, 66 Me. 420; Lake Shore &

Mich. Southern Ry. Co. *v.* Roy, 5 Bradw. (Ill.), 82.

<sup>3</sup> Ga. R. R. & B. Co. *v.* McDade, *supra*.

<sup>4</sup> Central R. R. Co. *v.* Mitchell, 63 Ga. 173; S. C. 1 Am. and Eng. R. R. Cas. 145.

<sup>5</sup> Hunt *v.* Chi. & N. W. R. R. Co., 26 Iowa, 363; Schroeder *v.* Chi., R. I. & P. R. R. Co., 41 Ia. 344; Potter *v.* Chi., R. I. & P. R. R. Co., 46 Ia. 399, 16 Am. Ry. Rep. 57; Pyne *v.* C., B. &

The doctrine of *respondeat superior* does not apply to the railroad corporation in reference to acts done by the servant or employe of the contractor of the corporation, ordering and prosecuting the work under his own direction.<sup>1</sup> In such case the principle applies to the contractor himself, he being the immediate and actual superior of the servant. But if no more is done than the law allows, and nothing be done except in a legal manner, no liability will rest on either the contractor or company.<sup>2</sup> But the exemption of the company is not permitted where the contractor or his servant is engaged in the exercise of the power

Q. R. R. Co., 54 Ia. 223; S. C. 6 N.W. Repr. 281, 21 Am. Ry. Rep. 229; *Thompson v. Cent. R. R. & Bkg. Co.*, 54 Ga. 509; *Western & Atlantic R. R. Co. v. Adams*, 55 Ga. 279; *Marsh v. S. Car. R. R. Co.*, 56 Ga. 274; *Georgia R. R. & Bkg. Co. v. Rhodes*, *Id.* 645; *Ditberner v. Chicago, Milwaukee & St. Paul Ry. Co.*, 47 Wis. 138, 21 Am. Ry. Rep. 37. In Iowa, the statute only extends to those engaged in the actual operation of the road, and not to all persons employed by the company: *Potter v. C., R. I. & P. Ry. Co.*, and *Schroeder v. same*, *supra*. But it is otherwise in Pennsylvania: *Ricard v. N. Penn. R. R. Co.*, 89 Penn. St. 193. In determining whether a locomotive engineer, injured by a collision, is guilty of negligence in not jumping off the engine, the standard of ordinary care and prudence on his part must be fixed with reference to the peculiar responsibilities of his employment: *Cottrill v. C., M. & St. P. Ry. Co.*, 47 Wis. 634, 21 Am. Ry. Rep. 66. A railroad company is not obliged, under the statute of Illinois compelling the delivery of grain to warehouses (Rev. St. 1874, ch. 114, sec. 82), to run its trains upon a track unfit for use, and for injuries thus resulting to an employe they are liable: *Stetler v. Chicago & Northwestern Ry. Co.*, 49 Wis. 609; S. C. 6 N.W. Repr. 303, 21 Am. Ry. Rep. 89. Where

an employe was injured, partly through the contributory negligence of a co-servant, but mainly by reason of the defective condition of the track, it was held that such contributory negligence would not preclude a recovery: *Ibid.*, and S. C. (on former appeal), 46 Wis. 497. Under the Iowa Code, sec. 1307, it is held that a detective directed by a superior to walk along the track and make certain investigations, is engaged in service exposing him to the hazards of operating a railroad, and is within that section: *Pyne v. C., B. & Q. Ry. Co.*, *supra*. Where the injury occurs in another state than that where suit is brought, the liability is tested by the laws of that state: *Stetler v. Chicago & Northwestern Ry. Co.*, 46 Wis. 497, 21 Am. Ry. Rep. 402. Such statutes have no extra-territorial effect: *Anderson v. Milwaukee & St. Paul Ry. Co.*, 37 Wis. 321. And in Wisconsin the statute does not apply to employes: *Berg v. Chicago, Milwaukee & St. Paul Ry. Co.*, 50 Wis. 419; S. C. 7 N.W. Repr. 347.

<sup>1</sup> *Clark's Adm'x v. Hannibal & St. Joe R. R. Co.*, 36 Mo. 202; *Young v. New York Central R. R. Co.*, 30 Barbour (N. Y.), 229; *Burke v. Norwich & Worcester R. R. Co.*, 34 Conn. 474.

<sup>2</sup> *Clark's Adm'x v. Hannibal & St. Joe R. R. Co.*, 36 Mo. 202.

of eminent domain, or in some act which is permitted to be done by the charter, but which, without such special power, would be unlawful. In such case the company is held liable, upon grounds of public policy, for the acts of the contractor in excess of the power. But this exception does not extend to torts committed by the contractor not in the execution of such powers.<sup>1</sup>

**4. How far applicable to the company for acts of contractor's servant.**—The principles of *respondet superior* do not apply as between a railroad corporation and its contractor, executing an independent contract in the contractor's own manner, and under his sole control, so that there is no relation of master and servant existing between them.<sup>2</sup> But if the very act complained of, as also the objectionable manner of performing it, be authorized and contracted for by the company, and has its concurrence, or be done under its superintendence, then the company is liable, upon the elementary principle that whoever aids, assists or procures the commission of a trespass, or other wrong, is liable as a principal for the injury done thereby.<sup>3</sup> The owner

<sup>1</sup> *Cairo & St. Louis R. R. Co. v. Woosley*, 85 Ill. 370; *Houston & Great Northern R. R. Co. v. Meador*, 50 Tex. 77; *Cunningham v. International R. R. Co.*, 51 Tex. 503.

<sup>2</sup> *Carman and another v. The Steubenville & Ind. R. R. Co.*, 4 Ohio St. 399; *McCafferty v. Spuyten Duyvil & Port Morris R. R. Co.*, 61 N. Y. 178, 12 Am. Ry. Rep. 105; *Slater v. Merseureau*, 64 N. Y. 138; *Rourke v. White Moss Colliery Co.*, Law Rep. 2 C. P. Div. 205; *Pearson v. Cox*, *Id.* 369; *Gilbert v. Halpin*, 3 Irish Jur., (N. S.) 300; *Richmond v. Russell*, 11 Cas. Ct. Sess. (2d Ser.), 1035; S. C. 12 *Id.* 887 (Scotch); *Wray v. Evans*, 80 Penn. St. 102; *Hass v. Phil. & S. M. St. Co.*, 88 *Id.* 269; *Carter v. Berlin Mills Co.*, 58 N. H. 52; *Kansas Cent. Ry. Co. v. Fitzsimmons*, 18 Kans. 34; S. C. 22 Kans. 636; *Cunningham v. Int. R. R. Co.*, 51 Tex. 503; *Tibbetts v. Knox & Lincoln R. R. Co.*, 62 Me. 437; *Union Pac. R. R. Co. v. Hause*, 1 Wyoming,

27.

<sup>3</sup> *Carman and another v. The Steubenville & Ind. R. R. Co.*, 4 Ohio St. 399; *McCafferty v. S. D. & P. M. R. R. Co.*, *supra*; *Lake Superior Iron Co. v. Erickson*, 39 Mich. 492; *Sercandat v. Saisse*, Law Rep. 1 P. C. 152; *Robinson v. Webb*, 11 Bush, 464; *Houston & Great Northern R. R. Co. v. Meador*, 50 Tex. 77. See *Whitney v. Clifford*, 46 Wis. 138. And so, also, in England. When that only is done which the employer authorized to be done, then, if it be a wrong act, the master is responsible for the wrong: *Ellis v. The Sheffield Gas Consumers' Co.*, 2 El. & Bl. 767. But the company will not become liable to laborers employed by the contractor by furnishing implements and materials for the work: *Central R. R. & Banking Co. v. Grant & O'Hara*, 46 Ga. 417, 11 Am. Ry. Rep. 427. And see *King v. N. Y. Cent. & H. R. R. Co.*, 66 N. Y. 181; S. C. 4 Hun, 769.

of real estate is held to no stricter rule in this regard than the owner of personal property, unless a nuisance is created.<sup>1</sup>

5. **Not applicable to the company as to injuries committed by passengers.**—Notwithstanding the right of a railroad company and its conductors to govern and control within its own cars, and the duty of passengers to observe order and obey all reasonable commands,<sup>2</sup> yet there is no such privity between the company or its conductors, and passengers on its trains, as will render the company liable, upon the principles of *respondeat superior*, in an action for wrongs inflicted by passengers on each other.<sup>3</sup> And although the company will be liable for injuries inflicted on the cars by disorderly conduct which the conductor makes no effort to prevent, yet it is not liable for the results of mob violence on a train, which is beyond the power of the conductor to suppress.<sup>4</sup> And though railroad companies are bound to do all things within their power to render the transit of their passengers comfortable and safe, in the ordinary understanding of these terms, yet they are not bound to foresee and provide against extraordinary contingencies growing out of the wrong acts of others, or of the passengers; nor are they bound to provide and carry with their trains a police force or guard to meet the emergency of mobs, or with which to suppress the same.<sup>5</sup> "It is not more the duty of railroad companies to transport their passengers safely than it is the duty of passengers to behave in a quiet and orderly manner. This is a duty which passengers owe both to the company and to fellow-passengers, and

The fact that the company has power to discharge workmen does not affect its liability: *Robinson v. Webb*, *supra*; nor power to terminate the contract: *Wray v. Evans*, *supra*; *Schular v. Hudson River R. R. Co.*, 38 Barb. 653; nor provisions in the contract between the company and the contractor, making the latter liable for all injuries, and authorizing the company to withhold payments: *Tibbetts v. Knox & Lincoln R. R. Co.*, *supra*.

<sup>1</sup> *McCafferty v. S. D. & P. M. R. R. Co.*, *supra*; *King v. N. Y. C. & H. R. R. R. Co.*, *supra*; *Robinson v. Webb*,

*supra*; *Ryan v. Curran*, 64 Ind. 345. But where works erected by the contractor might ordinarily be expected to result in an injury, the landowner has been held liable: *Bower v. Peate*, Law Rep. 1 Q. B. Div. 321; *Angus v. Dalton*, 4 *Id.* 162.

<sup>2</sup> *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Hinds*, 53 Penn. St. 512.

<sup>3</sup> *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Hinds*, 53 Penn. St. 512.

<sup>4</sup> *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Hinds*, 53 Penn. St. 512.

<sup>5</sup> *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Hinds*, 53 Penn. St. 512.

when one is injured by neglect of this duty, the wrong-doer should respond in damages.”<sup>1</sup>

6. **The rule not applicable to willful and independent acts of servant.**—The rule of *respondet superior* does not apply to the independent wrongful act of a servant, not authorized or ratified by the employer, but done of his (the servant's) own mere malice or private hate, although done under pretense of discharging his duty. The liability is, in such case, on the servant only.<sup>2</sup> But in Illinois it is held that if servants of a railroad company, while engaged in the discharge of their duties, pervert the appliances of the company to wanton and malicious purposes, the company is liable for injury resulting—as in case of the wanton and negligent discharge of steam so as to frighten a horse.<sup>3</sup> In the absence of statutory regulations, it is for the jury to say what is a reasonable use of signals.<sup>4</sup>

<sup>1</sup> Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Hinds, 53 Penn St. 512, 515.

<sup>2</sup> Evansville & Crawfordsville R. R. Co. v. Baum, 26 Ind. 70, 72; Little Miami R. R. Co. v. Wetmore, 19 Ohio St. 110; Rounds v. Del., Lack. & Western R. R. Co., 64 N. Y. 136; Cohen v. Dry Dock, E. B. & B. R. R. Co., 69 N. Y. 170; Hughes v. N. Y. & New Haven R. R. Co., 36 N. Y. Supr. 222; Stewart v. Brooklyn Cross-town R. R. Co., 9 10pr. 759; Penn. Co. v. Toomey, 91 Penn. St. 256; S. C. 37 Leg. Int. 105; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Snyder v. Hannibal & St. Jos. R. R. Co., 60 Mo. 413.

<sup>3</sup> Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298; Chicago, Burlington & Quincy R. R. Co. v. Dickson, 63 Ill. 151, 7 Am. Ry. Rep. 45; S. C. 88 Ill. 431, 21 Am. Ry. Rep. 328; Nashville & Chattanooga R. R. Co. v. Starnes, 9 Heisk. 52, 19 Am. Ry. Rep. 280. See, also, Phil. Wilm. & Balt. R. R. Co. v. Stinger, 78 Penn. St. 219; Phil. & Reading R. R. Co. v. Killips, 88 Id. 405; Georgia R. R. Co. v. Newsome, 60 Ga. 492; Borst

Lake Shore & Mich. Southern Ry. Co., 4 Hun, 346; Manchester S. J. & A. Ry. Co. v. Fullarton, 14 C. B. (N. S.), 54. But the objection that the act is willful must be taken advantage of by motion for nonsuit, or asking an instruction, in order to preserve it: Hahn v. Southern Pacific R. R. Co., 51 Cal. 605, 12 Am. Ry. Rep. 226. Vindictive damages will not be allowed, however, where there is no evidence the company knew the reckless character of the servant: *Ibid.* As to what will be sufficient allegations on which to found the action, see C., B. & Q. R. R. Co. v. Dickson, 88 Ill. 431, 21 Am. Ry. Rep. 328. Where the action proceeds as for negligence of the defendant, contributory negligence is a defense; but when based upon the willful and malicious act of the servant, it is not: *Ibid.* Malice or willfulness is a question of fact for the jury: *Ibid.*

<sup>4</sup> Hill v. Portland & R. R. R. Co., 55 Me. 438; P., W. & B. R. R. Co. v. Stinger, *supra*.



## CHAPTER XL.

### THE MEASURE OF DAMAGES.

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1. **Ordinarily, is compensation.**—It is a general rule of the law, that compensation is the measure of ordinary damages; so that a party having the right to recover is entitled to that sum which will make him whole, and to no more.<sup>1</sup>

If the action be for a specified and agreed sum of money due, then the measure of recovery is that sum, with interest thereon from the time the right of action accrued; if for violation of contract, then the measure of damages is that sum which will make the party whole in respect to his loss directly resulting from the breach, and no more;<sup>2</sup> and if for pay for property, or for labor or service performed, when no price is fixed, then the measure of damages is a *quantum meruit*, that is, as much as the value thereof, or as it is worth.<sup>3</sup>

<sup>1</sup> *Shelbyville Lateral Br. R. R. Co. v. Lewark*, 4 Ind. 471; *Waco Tap R. R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ry. Rep. 233.

<sup>2</sup> *Western R. R. Co. v. Babcock*, 6 Met. 346.

<sup>3</sup> *Shelbyville Lateral Br. R. R. Co. v. Lewark*, 4 Ind. 471.

If the action be for a tort, with no aggravating circumstances to take the case out of the general rule, still the measure of damages is compensation for the actual loss directly flowing therefrom, and no more;<sup>1</sup> but if the wrong be accompanied with personal indignity, abuse or injury to the party, he is then to be made whole for these, and for the suffering, pain and loss of time incurred, if any, by reason thereof, and for cost of medical aid rendered necessary thereby, and for whatever damage results to him directly from the injury or wrong; and if the injury be personal and permanent, its permanency is to be considered in fixing the amount. In all these cases, the measure of damages is a *quantum meruit*—is compensation, as much as will compensate the party for the injury, wrong, suffering, expenses of medical aid, and future physical disability, as the case may be, and no more; for such physical inability, if the direct result of the injury, is likewise to be compensated, whether the same be partial only or be total. The fair and legal value of all these are ordinarily compensation, in such cases as involve them, and to the extent involved in each particular case.<sup>2</sup> And in some cases, where the injury is principally a wrong or insult, willfully and deliberately inflicted, with intent to degrade and insult, compensation may be had for mental suffering incurred.<sup>3</sup>

In estimating the damages occasioned by a personal injury resulting from the negligence of the defendant, the jury may take into consideration the effect of the injury upon the mental faculties of the plaintiff, and this, too, whether the act occasioning the injury be willful or not.<sup>4</sup>

Under the general statutes of Kentucky, secs. 1 and 3, chap. 57, the allegation of willful neglect includes all inferior degrees

<sup>1</sup> *Shelbyville Lateral Br. R. R. Co. v. Lewark*, 4 Ind. 471; *Wise v. Freshley*, 3 McCord (S. Car.), 547.

<sup>2</sup> *Holyoke v. The Grand Trunk R. W. Co.*, 48 N. H. 541; *Penn. R. R. Co. v. Allen*, 53 Penn. St. 276; *Penn. R. R. Co. v. Books*, 57 Penn. St. 339; *Pittsburgh, Allegheny & Manchester Pass. Ry. Co. v. Donahue*, 70 Penn. St. 119; *Ransom v. N. York & Erie R. R. Co.*, 15 N. Y. 415; *Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y. 534; *Spicer v. Chi. & Northwestern*

*Ry. Co.*, 29 Wis. 580; *Peoria Br. Assn. v. Loomis*, 20 Ill. 235; *Whalen v. St. Louis, Kansas City & Northern Ry. Co.*, 60 Mo. 323, 9 Am. Ry. Rep. 224; *Wade v. Leroy*, 20 Howard, 34; *Western & Atlantic R. R. Co. v. Drysdale*, 51 Ga. 644, 7 Am. Ry. Rep. 343.

<sup>3</sup> *Craker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118.

<sup>4</sup> *Toledo, Wabash & Western Ry. Co. v. Baddeley*, 54 Ill. 19.

of negligence; and accordingly where a plaintiff fails to establish his right to punitive damages by proving willful negligence, he may, nevertheless, upon proof of culpable negligence, recover compensatory damages.<sup>1</sup>

Where the plaintiff gives evidence tending and intended to show the probable value of his earnings in case the injury had not occurred, evidence is proper, by way of rebuttal, which may go to show the habitual drunkenness of the plaintiff, and thereby rebut the presumption of what it were otherwise probable the earnings would amount to. Whatever goes to show the party incapacitated for labor, or to rebut the probability of his earnings, is proper as evidence in questions of compensatory damages.<sup>2</sup>

Damages for physical or mental suffering can only be recovered by the party suffering, not by such party's representative, legal or personal, in case of his death.<sup>3</sup>

In actions by parents for the death of children, the foundation of the action at common law is the relation of master and servant, and at common law the parent can only recover for the loss of service up to the time of the death, and for the expenses incurred on account of the injury, for care, nursing and medical attendance.<sup>4</sup>

In Louisiana, if no exact computation can be made for damages, as in cases of severe injuries, or loss of life, much discretion is left to the judge or jury, as the case may be, by whichever the trial is had in the assessment of damages.<sup>5</sup>

<sup>1</sup> *Claxton v. Lexington & Big Sandy R. R. Co.*, 13 Bush, 636, 17 Am. Ry. Rep. 12.

<sup>2</sup> *Cleveland & Pittsburgh R. R. Co. v. Sutherland*, 19 Ohio St. 151.

<sup>3</sup> *The Covington Street R. W. Co. v. Packer*, 9 Bush (Ky.), 455. *PRYOR, J.*, in the case just cited, lays down the following language: "This physical and mental suffering only applies to the suffering by the party losing his life. The mental suffering of one person on account of a physical injury to another is too uncertain a test in determining the question of damages, and we think can not be sustained by

reason or authority. Such damages are too remote to be given by either a court or jury." *Ib.*, p. 459.

<sup>4</sup> *The Covington Street R. W. Co. v. Packer*, 9 Bush (Ky.), 455; *Eden v. Lexington & Frankfort R. R. Co.*, 14 B. Mon. 204; *Houston & Great Northern R. R. Co. v. Miller*, 49 Tex. 322; *Cregin v. Brooklyn Cross-town R. R. Co.*, 75 N. Y. 192; S. C. 19 Hun, 341.

<sup>5</sup> Civil Code, 1928, § 3; *Hermann v. N. O. & C. R. R. Co.*, 11 La. An. 5; *Choppin v. N. Orleans & Carrollton R. R. Co.*, 17 La. An. 19; *Frank v. New Orleans & Carrollton R. R. Co.*, 20 La. An. 25. See *Kansas Pac. Ry.*

Among the matters to be considered in coming at such estimate, if death do not ensue, are the loss of employment, the painful nature of the injury, the permanent character thereof, and resulting inability therefrom to perform such labor as before the injury;<sup>1</sup> and in case death ensue, as the action in Louisiana by next of kin, given by the code, is by survivorship, and not of original right conferred on the plaintiff,<sup>2</sup> we therefore suppose any ground of damages may be estimated which would have been proper if the action was by the injured party himself.

In cases not calling for punitive damages, the admission of evidence tending to enhance the amount of a verdict beyond a fair and legal compensation, is not only error, but unless recalled or ruled out by the court before the remarks of counsel to the jury, a verdict will be arrested, or the case reversed therefor, on motion below, or on appeal or error in the court above, as the point may arise, if properly made and reserved. Such evidence, if admitted, must, to avoid error, be struck out by the court at or before the close of the testimony, so that counsel be not allowed to refer to, or dwell upon, it in their address to the jury. It is too late to cure the error by directing the jury, in the charge of the court, to disregard it.<sup>3</sup> The mischief may have already become indelibly fixed by the impressions it has made on the minds of the jury.

It is a duty devolving upon an injured person to exercise reasonable care and diligence to effect a speedy cure of the injury; and for loss or suffering caused or enhanced by the neglect to use such care, there can be no recovery.<sup>4</sup> But when acting in good faith, and under advice of a physician, he is not responsible for the latter's mistakes.<sup>5</sup>

Co. v. Cutter, 19 Kans. 88; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Ewen v. Chi. & N. W. Ry. Co., 38 Wis. 613; Burton v. Wilmington & Weldon R. R. Co., 82 N. Car. 504; Kansas Pac. Ry. Co. v. Miller, 2 Col. 442.

<sup>1</sup>Choppin v. N. Orleans & Carrollton R. R. Co., 17 La. An. 19.

<sup>2</sup>Earhart v. N. Orleans & Carrollton R. R. Co., 17 La. An. 243, 244 and 245. And for loss of life of an infant, by

the fault of another, in Louisiana, an action will lie by the father: Frank v. New Orleans & Carrollton R. R. Co., 20 La. An. 25.

<sup>3</sup>Pennsylvania R. R. Co. v. Butler, 57 Penn. St. 335, 338.

<sup>4</sup>Allender v. Chi., Rock Isld. & Pacific R. R. Co., 37 Iowa, 264; Lyons v. Erie Ry. Co., 57 N. Y. 489, 7 Am. Ry. Rep. 63.

<sup>5</sup>Lyons v. Erie Ry. Co., *supra*.

**2. In assessments for right of way.**—The measure of damages in assessments for right of way, or for lands taken for railroad purposes under the right of eminent domain, is simply compensatory—that which will make the landholder whole. No right is violated; no wrong is inflicted; if no illegal act, as to the manner, is committed. The government simply takes what it has a right to, and is to make compensation therefor.<sup>1</sup> The measure of compensation, however, and the manner of arriving thereat, are subjects more immediately under present consideration.<sup>2</sup> Upon this subject, the Supreme Court of Pennsylvania lay down the law in the following terms, and which we conceive to be in accordance with, and an able, but brief, summing up of, the general principles thereof, when uncontrolled by statutory requirements: “If judicial authority can fix any rule, the series of adjudged cases from *Thoburn’s case*, 7 S. & R. 411, down to *Harvey’s case*, 11 Wright, 434, has established the measure of damages for building a railroad through a man’s land, to be the difference betwixt the value of the land before the road was built and its value after the road is finished. In estimating the disadvantages resulting from the road, consequential or speculative damages are to be rejected, and in estimating the advantages, such only as are special and peculiar to the property in question are to be considered, and not such as are common to the public. It is the business of the viewers in the first instance, and on appeal, of the jury, to balance the advantages that are special against the disadvantages that are actual, and with the aid of whatever testimony is laid before them, to find out as well as they can how much less the land would fetch in market by reason of the road, and that sum, which will represent what has really been taken away from the owner, should be given back in damages.”<sup>3</sup>

<sup>1</sup> *Hornstein v. The Atlantic & Great Western R. R. Co.*, 51 Penn. St. 87.

<sup>2</sup> This right to compensation obtains in behalf of an occupying tenant, holding a mere leasehold estate: *Wainwright v. Ramsden*, 1 Eng. R. W. & C. Cases, 714; *Rex v. Liverpool & Manchester Ry. Co.*, 1 Eng. R. W. & C. Cases, 584.

<sup>3</sup> *Hornstein v. Atlantic & Great*

*Western R. R. Co.*, 51 Penn. St. 87, 90. And to the same effect, see also, *East Pennsylvania R. R. Co. v. Hottentstine*, 47 Penn. St. 28; *Delaware, Lackawanna & Western R. R. Co. v. Burson*, 61 Penn. St. 369; *East Brandywine & W. R. R. Co. v. Ranck*, 78 Penn. St. 454; *Pennsylvania & N. Y. R. R. & Canal Co. v. Bunnell*, 81 Penn. St. 414, 16 Am. Ry. Rep. 1;

In New Hampshire the ruling is, that exposure of the landholder's remaining property to damage by fire from engines of the company, is a matter proper to be taken into consideration in assessing damages, notwithstanding the statute of that state rendering railroad corporations absolutely liable for such injuries. The jury are to consider how much, if any, less the value is, although thus indemnified.<sup>1</sup>

And so in Minnesota, the same rule of the difference in value immediately before and after the taking of the land, or easement over the land, prevails, as the true measure of compensation for what is taken.<sup>2</sup> Added to this is the damage to, or diminution in value of, the remaining parts of the tract from which it is taken. Benefits to be deducted are only such as are

*Hoffer v. Penn. Canal Co.*, 87 *Id.* 221; *Pittsburgh, V. & C. Ry. Co. v. Bentley*, 88 *Id.* 178; *San Francisco, Alameda & Stockton R. R. Co. v. Caldwell*, 31 *Cal.* 367; *Winona & St. Peter R. R. Co. v. Denman*, 10 *Minn.* 267; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 *Minn.* 122, 11 *Am. Ry. Rep.* 364; *Virginia & Truckee R. R. Co. v. Henry*, 8 *Nev.* 165; *Missouri River, Fort Scott & Gulf R. R. Co. v. Owen*, 8 *Kansas*, 409; *Robbins v. Milw. & Horicon R. R. Co.*, 6 *Wis.* 636; *Bangor & Piscataquis R. R. Co. v. McComb*, 60 *Maine*, 290; *Elizabethtown & Paducah R. R. Co. v. Helm's heirs*, 8 *Bush (Ky.)*, 681; *Selma, Rome & Dalton R. R. Co. v. Camp*, 45 *Geo.* 181; *Shipley v. The Balt. & Potomac R. R. Co.*, 34 *Md.* 336; *Rochester & Syracuse R. R. Co. v. Budlong*, 6 *Howard's Pr.* 467; *Troy & Boston R. R. Co. v. Lee*, 13 *Barbour*, 169; *Canandaigua & Niagara Falls R. R. Co. v. Payne*, 16 *Barbour*, 273; *Albany & Susquehanna R. R. Co. v. Dayton*, 10 *Abbott's Pr. (N.S.)*, 182; *Henderson v. N. Y. Cent. R. R. Co.*, 78 *N. Y.* 423; *S. C.* 17 *Hun*, 344; *Black River & M. R. R. Co. v. Barnard*, 9 *Hun*, 104; *Matter of Prospect Park & Coney Island R. R. Co.*, 13 *Hun*, 345; *S. C.*, 16 *Hun*, 261; *Cincinnati & Springfield Ry. Co. v. Longworth*, 30 *Ohio St.* 108; *Powers v. Hazelton & L. Ry. Co.*, 33 *Id.* 429; *Balt., P. & C. R. R. Co. v. Lansing*, 52 *Ind.* 229; *Chicago, Milwaukee & St. Paul R. R. Co. v. Hall*, 90 *Ill.* 42; *Chicago, Rock Island & Pac. R. R. Co. v. Carey*, *Id.* 514.

<sup>1</sup> *Adden v. The White Mountain N. H. R. R. Co.*, 55 *N. H.* 413; *S. C.* 11 *Am. Ry. Rep.* 246; *Pierce v. Worcester & N. R. R. Co.*, 105 *Mass.* 199; *Bangor & P. R. R. Co. v. McComb*, 60 *Me.* 290.

<sup>2</sup> *Winona & St. Peter R. R. Co. v. Denman*, 10 *Minn.* 267; *Same v. Waldron*, 11 *Minn.* 515; *Minn. Valley R. R. Co. v. Doran*, 17 *Minn.* 188; *Lake Superior & Miss. R. R. Co. v. Greve*, *Id.* 322; *St. Paul & Sioux City R. R. Co. v. Murphy*, 19 *Minn.* 500; *Colvill v. The St. Paul & Chicago Ry. Co.*, 19 *Minn.* 283; *Curtis v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*, 20 *Minn.* 28; *Sherwood v. St. Paul & Chicago Ry. Co.*, 21 *Minn.* 127, 11 *Am. Ry. Rep.* 370; *Scott v. St. Paul & Chi. Ry. Co.*, 21 *Minn.* 322.

peculiar or resulting to the same owner, and not such as are general to the public.<sup>1</sup>

And so in Georgia, the rule of compensation for property taken for right of way purposes is compensation for what is taken at its value; and if damages be claimed by the owner for possible or apprehended injuries, they are to be set off against the incidental and possible benefits to such owner from the erection of the road.<sup>2</sup>

This right of compensation for private property taken for public use extends as well to occupying tenants, as for the amount of damages to their estate or possession, as to owners of the fee. But nothing can be allowed in view of the reasonable expectation or chance of renewal of the lease. That is too remote, and is at most not an actual interest, but a mere chance, and if renewable, is at the tenant's option, yet, he not being bound to renew, there is, by the same rule, no ground for damages.<sup>3</sup>

By the statute in Massachusetts, railroad companies are required, in addition to paying the pecuniary damages that may be assessed for taking their right of way, to construct and maintain such embankments, drains, culverts, walls, fences and other structures, as the commissioners of the county shall judge reasonable for the security and benefit of the landholder; and the statute makes it the duty of the commissioners to prescribe the time within which the same shall be done. For neglect of compliance therewith, the landholder may recover double damages under the statute for all damages sustained. If no time be stated

<sup>1</sup> *W. & St. P. R. R. Co. v. Waldron*, *supra*; *Minn. Cent. Ry. Co. v. McNamara*, 13 Minn. 508; *Carli v. Stillwater & St. P. R. R. Co.*, 16 Minn. 260; *Minn. Valley R. R. Co. v. Doran*, *supra*; *Weir v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*, 18 Minn. 155. But everything connected with the general improvement which gives a special value to the land may be considered: *Pittsburgh & Lake Erie R. R. Co. v. Robinson*, 95 Penn. St. 426; *S. C. 1 Am. & Eng. R. R. Cas.* 468; *Donovan v. City of Springfield*, 125 Mass. 371.

<sup>2</sup> *Jones v. Wills Valley R. R. Co.*, 30 Geo. 43; *City of Atlanta v. Cent. R. R. & B. Co.*, 53 Ga. 120.

<sup>3</sup> *Rex v. Liverpool & Manchester R. W. Co.*, 1 Eng. R. W. & C. Cases, 584. And for damages to a mere easement owned over the lands taken, the owner of the easement is entitled to compensation. He is to obtain it, however, in the same manner as if it were damages by the taking of the fee—that is, under the statute. *Thicknesse v. The Lancaster Canal Co.*, 1 Eng. R. W. & C. Cases, 612.

within which these betterments are to be made, then no action will lie against the company for omitting to make them.<sup>1</sup>

While the selling price of similar lands in the neighborhood, if there be a general one, may be rightfully admitted in evidence in reference to the damages to be allowed for lands, or an easement over lands, taken for a right of way,<sup>2</sup> yet evidence may not be given of particular sales; the latter is inadmissible.<sup>3</sup> The allowance of such a practice would open the door to the investigation of not only the good faith of such particular sales, as well on behalf of one party as the other,<sup>4</sup> but would also allow the merits of each particular sale referred to in the evidence to be investigated, and thereby divert the inquiry of the court into collateral questions and new issues, seemingly without any known end. The fact of what one person has received for his property, and which may, after all, be but an exceptional instance, proves nothing as to what another is entitled to for his.<sup>5</sup> It is therefore irrelevant and improper as evidence in the assessment of damages for a right of way. It is unlike evidence of a general market price, which is a fair test, and which represents the judgment of the community.<sup>6</sup>

In Indiana, the rule for measuring damages under the statute

<sup>1</sup> *Keith v. Cheshire R. R. Co.*, 1 Gray, 614.

<sup>2</sup> *Searle v. Lackawanna & Bloomsburg R. R. Co.*, 33 Penn. St. (9 Casey), 57; *East Penn. R. R. Co. v. Hiester*, 40 Penn. St. 53; *Chapin v. Boston & Providence R. R. Co.*, 6 Cush. 422; *Upton v. South Reading Br. R. R. Co.*, 8 Cush. 600; *Wyman v. Lexington & W. Camb. R. R. Co.*, 13 Met. 327.

<sup>3</sup> *East Penn. R. R. Co. v. Hiester*, 40 Penn. St. 53; *Pennsylvania & N. Y. R. R. & Canal Co. v. Bunnell*, 81 Penn. St. 414, 16 Am. Ry. Rep. 1; *Brunswick & Albany R. R. Co. v. McLaren*, 47 Ga. 546, 11 Am. Ry. Rep. 412; *Stinson v. Chi., St. P. & M. Ry. Co.*, 27 Minn. 284; S. C. 6 N. W. Repr. 786. But such evidence is admissible in Iowa, on establishing an uniformity in character of the lands:

*King v. Iowa Midland R. R. Co.*, 34 Ia. 458, 4 Am. Ry. Rep. 199.

<sup>4</sup> *East Penn. R. R. Co. v. Hiester*, 40 Penn. St. 53.

<sup>5</sup> *East Penn. R. R. Co. v. Hiester*, 40 Penn. St. 53.

<sup>6</sup> *East Penn. R. R. Co. v. Hiester*, 40 Penn. St. 53; *Wilson v. Rockford, Rock Island & St. Louis R. R. Co.*, 59 Ill. 273, 11 Am. Ry. Rep. 189; and evidence of an offer is also inadmissible, either for or against the company: *St. Joseph & Denver City R. R. Co. v. Orr*, 8 Kans. 419, 5 Am. Ry. Rep. 127; *Lehmick v. St. Paul, Stillwater & Taylor's Falls R. R. Co.*, 19 Minn. 464, 10 Am. Ry. Rep. 296; *Montclair Ry. Co. v. Benson*, 36 N. J. Law, 557, 12 Am. Ry. Rep. 467; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Selma, Rome & Dalton R. R. Co. v. Keith*, 53 Ga. 178.



in assessments for right of way, allows the benefits resulting to the land holder by the construction of the railroad, if any, to be set off against the value of the property taken and the damages arising therefrom.<sup>1</sup> This rule was established under the constitution of that state of 1816, and an act of assembly passed under that constitution, in which it was provided that benefits in such cases should be set off against damages.<sup>2</sup> The doctrine of said case, says GOOKINS, J., in 1858, has been followed in various others since decided; that "It had become the settled law of the state, at the time of the adoption of the present constitution," which was in 1851; that at the adoption of the latter, an effort was made to change this section, by providing that in estimating the damages for property taken for public use, the benefits conferred upon the owner by the construction of the work should not be taken into consideration; that this proposition was fully discussed, and with reference, too, to the construction which, by the courts, had been put upon the corresponding provision of the old constitution; and that the proposed change was rejected, on full discussion, and by a decisive vote, thereby adopting the section as it stood before in the old constitution in this particular.<sup>3</sup> The court then say: "With this authoritative exposition of the meaning of the provision by its authors, we can not hesitate upon the question of its construction. We are of the opinion that the instruction should have been given." This instruction was as follows, and had been refused by the court below, viz: "In ascertaining the extent of the injury to the plaintiffs, an estimate of the value of the property taken, at the time of taking, is a necessary step; but, if the benefits resulting to the plaintiffs, by the construction of the railroad, equal in pecuniary value the value of the property taken by the defendants, it is a just and legal compensation for the property so taken."<sup>4</sup> And so, we suppose, *pro tanto*, if the benefits are less, but in no case to be allowed in excess of the damages. Thus we find it settled in Indiana that in the estimate of the damages in cases of private property taken for public use, the benefits conferred

<sup>1</sup> Indiana Cent. R. R. Co. v. Hunter, 8 Ind. 74.

<sup>2</sup> Ind. Cent. R. R. Co. v. Hunter, *supra*.

<sup>3</sup> Debates in Indiana Const. Conven-

tion, vol. 1, pp. 361, 362.

<sup>4</sup> Indiana Cent. R. R. Co. v. Hunter, 8 Ind. (Tanner), 74, 78; McIntire v. State, 5 Blackf. 384.

are to be set off against the damages;<sup>1</sup> not, however, to exceed the amount of the latter.

Where witnesses estimate the damages at various sums, from eighteen hundred to eighteen thousand dollars, an assessment of five thousand five hundred dollars is not excessive.<sup>2</sup> But the jury have no power to find damages as to matters of which no proof is before them.<sup>3</sup> It is not error for the court to refuse to instruct the jury that they can not take an average of the testimony, and then tell them they can not set down and add up the amounts sworn to, and then divide by the number of witnesses;<sup>4</sup> for while a jury may always take an average of testimony, if properly done, they should never be so instructed without explanation that they should consider all the elements and circumstances referred to in the law as proper to be considered.<sup>5</sup>

Evidence of the annual net profits of land for a particular use is not admissible to prove the value at the time of taking.<sup>6</sup>

It follows from the law as herein stated, that an inquiry as to the fair market value immediately after the construction and successful operation of the road, only as affected by the construction, is proper;<sup>7</sup> and also an inquiry whether the location and construction of the railroad is an advantage or disadvantage, and in what way.<sup>8</sup> The fact that public improvements are made near the land after the construction of the road, is immaterial.<sup>9</sup> The market value is to be proven in the usual way. It is not a matter of technical knowledge to be proved by experts. Persons living in the neighborhood are presumptively competent witnesses for this purpose.<sup>10</sup> The effect of the burden of fencing is

<sup>1</sup> *Indiana Cent. R. R. Co. v. Hunter*, 8 Ind. (Tanner), 74, 78, 79; *McIntire v. State*, *supra*. See *Malone v. City of Toledo*, 34 Ohio St. 541, S. C. 28 *Id.* 643; *Holton v. City of Milwaukee*, 31 Wis. 27.

<sup>2</sup> *Peoria & Rock Island Ry. Co. v. Birkett*, 62 Ill. 332, 7 Am. Ry. Rep. 334.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Stockton & Copperopolis R. R. Co. v. Galgiani*, 49 Cal. 139, 7 Am.

Ry. Rep. 263.

<sup>7</sup> *Pennsylvania & N. Y. R. R. & Canal Co. v. Bunnell*, 81 Penn. St. 414, 16 Am. Ry. Rep. 1.

<sup>8</sup> *Penn & N. Y. R. R. & C. Co. v. Bunnell*, *supra*.

<sup>9</sup> *Penn & N. Y. R. R. & C. Co. v. Bunnell*, *supra*.

<sup>10</sup> *Penn & N. Y. R. R. & C. Co. v. Bunnell*, *supra*; *Frankfort & K. R. R. Co. v. Windsor*, 51 Ind. 238; *Diedrich v. N. W. Union Ry. Co.*, 47 Wis. 662. And see *Stockton & Copperopolis R. R. Co. v. Galgiani*, *supra*;

to be considered.<sup>1</sup> The fact that, prior to the construction of the road, other means existed for transporting the produce of the owner's farm, such as a canal, is material in measuring the damages, irrespective of the amount received by the owner on the establishment thereof, or of the fact of its ownership by the railroad, they having power to close it.<sup>2</sup> The statement, in his petition, of a certain amount of damage sustained by the owner, while not a bar to a recovery of a larger amount, is persuasive evidence for the jury.<sup>3</sup>

Testimony is proper, on the question of value, which tends to show that a warehouse, erected for the storage and shipment of wheat, etc., possesses superior facilities for transacting such business over other structures of a like character in the same vicinity.<sup>4</sup> And so is testimony that the land sought to be taken affords the only route by which the company can make a connection with other railways terminating at that place.<sup>5</sup>

**3. For injuries to live stock at common law.**—For injuries to live stock by a railroad company at common law, where the occurrence is the result of mere negligence, the measure of damages is the same as in ordinary cases of injuries to personal property caused by negligence or want of ordinary care. Com-

*Tate v. Mo., Kans. & Tex. Ry. Co.*, 64 Mo. 149, 17 Am. Ry. Rep. 191; *Sexton v. N. Bridgewater*, 116 Mass. 200; *Tucker v. Mass. Cent. R. R. Co.*, 118 Mass. 546; S. C. 9 Am. Ry. Rep. 279; *Boston & Me. R. R. Co. v. Montgomery*, 119 Mass. 114; *Snow v. Boston & Me. R. R. Co.*, 65 Me. 230; S. C. 10 Am. Ry. Rep. 27; *Selma, Rome & Dalton R. R. Co. v. Keith*, 53 Ga. 178. Their opinion is admissible as to the rental value of leasehold property: *Lawrence v. City of Boston*, 119 Mass. 126; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544. But an opinion as to the probable rental value of vacant land, if improved, is inadmissible: *Burt v. Wigglesworth*, 117 Mass. 302; *Gardner v. Brookline*, 127 Mass. 358. The question whether the witness is qualified to give his opinion is largely within the

discretion of the trial court: *Stockton & Copperopolis R. R. Co. v. Galgiani*, *supra*; *Boston & Me. R. R. Co. v. Montgomery*, *supra*; *Lawrence v. Boston*, *supra*; *Chandler v. Jamaica Pond Aqueduct Co.*, 125 Mass. 544. The reasons for such opinions may also be given: *Sexton v. N. Bridgewater*, *supra*; *Hawkins v. Fall River*, 119 Mass. 94; *Gardner v. Brookline*, *supra*.

<sup>1</sup> *Penn. & N. Y. R. R. & C. Co. v. Bunnell*, *supra*.

<sup>2</sup> *Penn. & N. Y. R. R. & C. Co. v. Bunnell*, *supra*.

<sup>3</sup> *P. & N. Y. R. R. Co. v. Bunnell*.

<sup>4</sup> *Rippe v. Chicago, Dubuque & Minn. R. R. Co.*, 23 Minn. 18, 17 Am. Ry. Rep. 19.

<sup>5</sup> *Brisbane v. St. Paul & Sioux City R. R. Co.*, 23 Minn. 114, 17 Am. Ry. Rep. 65.

pensatory damages is, in such cases, the rule—that which will make the injured party whole for the injury, and for the direct proximate loss caused thereby.<sup>1</sup> The leading case here cited was one where a wagoner came with his wagon and team to a depot to haul away goods, and the wagon and team were run over and destroyed. It was ruled that he had a right to recover their value, and also the value of the particular trip of hauling caused thereby, as flowing immediately from the injury.<sup>2</sup>

**4. For injuries to live stock under the statute.**—To recover double damages against a railroad company under the statute, as given in some of the states, for injuries to live stock, the case must be brought by plaintiff within the terms of the statute.<sup>3</sup> In Iowa, there must be an affidavit of value and notice in writing of the injury served upon the railroad company. The affidavit itself—not a copy—must be served. Of these there must be thirty days' service, before a right to double damages accrues.<sup>4</sup>

But although, in an action under the statute for double damages occasioned by the killing of live stock, the averment of "due notice" to the company, without showing the character of the notice, is not sufficient, if objected to before trial, yet it is too late to object thereto, for the first time, after judgment against the defendant, upon demurrer to his answer.<sup>5</sup>

The measure of damages generally, where something has been realized from the dead animal, is the difference between its value before the injury and such sum; and in the absence of evidence that a larger sum might have been realized, an instruction to this effect is good.<sup>6</sup> And in case the owner is charged with such increased value, he may deduct a reasonable amount for his time and trouble in disposing of the animal.<sup>7</sup> Interest is

<sup>1</sup> *Shelbyville Lateral Br. R. R. Co. v. Lewark*, 4 Ind. 471; *Toledo, Peoria & Warsaw Ry. Co. v. Arnold*, 43 Ill. 418. In case of gross negligence or wanton and willful mischief by the defendant's agents, exemplary damages may be allowed: *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 156.

<sup>2</sup> *Shelbyville L. B. R. R. Co. v. Lewark*, *supra*. Interest is not allowable: *Meyer v. Atlantic & Pacific R. R. Co.*, 64 Mo. 542, 17 Am. Ry. Rep. 249.

<sup>3</sup> *Clary v. The Iowa Midland Ry.*

*Co.*, 37 Iowa, 344.

<sup>4</sup> *Mendell v. Chi. & N. W. Ry. Co.*, 20 Iowa, 9; *McNaught v. Chi. & N. W. R. R. Co.*, 30 Iowa, 336, 338, 339; *Campbell v. Chi., R. Isld. & P. R. R. Co.*, 35 Iowa, 334.

<sup>5</sup> *Clary v. The Iowa Midland Ry. Co.*, 37 Iowa, 344.

<sup>6</sup> *Dean v. Chicago & Northwestern Ry. Co.*, 43 Wis. 305; *S. C. 2 N. W. Repr.* 219, 15 Am. Ry. Rep. 359.

<sup>7</sup> *Dean v. C. & N. W. Ry. Co.*, *supra*.

allowable from the commencement of the action;<sup>1</sup> but where an instruction allowed the jury to compute interest from the date of the injury, the exception thereto was held not sufficiently specific to raise the question of its accuracy, and the maxim *de minimis non curat lex* was applied.<sup>2</sup>

Under the Missouri statute, giving the injured party double damages for injury sustained by reason of cattle or other live stock going onto a railroad for want of a fence to keep them off, and being there injured, or there committing an injury, a plaintiff is not entitled to double damages for injury to his grain in the field, caused by animals discharged from a wrecked train, and necessarily driven by the railroad company through the field as a means of getting them away from the wreck, although the road be not there fenced as is by statute required.<sup>3</sup> Therefore, although in such a case, the plaintiff, after stating substantially the cause of action, sufficiently to entitle him, if true, to single damages, and alleging the amount thereof, thereupon demand judgment for double the amount so alleged as the real damages, and claims the same as for double damages under and by virtue of the statute, then, the case made not being one for which a judgment for double damages may in law be given, the court may regard the claim of double damages as mere surplusage, and may retain jurisdiction and render judgment, if there be a right of recovery, for the real amount of damages, notwithstanding the doubling thereof, as claimed by plaintiff, would amount to a sum greater than the jurisdiction of the court.<sup>4</sup>

**5. For injury to goods received to carry.**—The measure of damages upon a recovery for injuries to goods received by a railroad company for carriage as common carriers, is, as a general rule, the difference between the marketable value of the goods in the condition in which they are delivered to the consignee, and what the fair market value thereof would have been at the same time and place, if then and there delivered in an uninjured condition, and within a reasonable time after receiving

<sup>1</sup>Dean v. C. & N. W. Ry. Co.;  
Chapman v. Chi. & N. W. Ry. Co., 26  
Wis. 295.

<sup>2</sup>Dean v. C. & N. W. Ry. Co.

<sup>3</sup>Grau v. St. Louis, Kansas City &  
Northern Ry. Co., 54 Mo. 240.

<sup>4</sup>Grau v. St. Louis, Kansas City &  
Northern Ry. Co., 54 Mo. 240.

the same for carriage.<sup>1</sup> But there are sometimes exceptions to this rule, one of which is, that though the article be so injured that on its arrival at its destination it will command no market price at all, yet, if by comparatively slight trouble and expense it may be restored again to a marketable condition, then the measure of damages is its market value when so restored to a marketable condition, less the labor, care, and cost of restoring the same.<sup>2</sup>

**6. For loss of goods received to carry.**—The measure of damages for goods received to be carried, and which are lost, destroyed, or from any cause (except the act of God or of the public enemy) not delivered, is the value of the goods at the place of delivery, less the freight thereon.<sup>3</sup>

The place of delivery, if there be no stipulation to the contrary, is, in law, the place to which the goods are consigned, upon, or at the end, as the case may be, of the carrier's own route; and not, in the absence of an express agreement therefor, at any place directed to, off of or beyond the terminus of his own route.<sup>4</sup>

**7. For failure to carry and deliver in a reasonable time.**—By some authorities, the measure of damages for failure to carry and deliver goods in a reasonable time, where such failure is the result of negligence of the carrier, is the difference in the market price of the article at the place of destination on the day of its actual arrival, and the day upon which, by proper diligence, it should have arrived thereat.<sup>5</sup> By others, it is the

<sup>1</sup> *Winne v. Ill. Cent. R. R. Co.*, 31 Iowa, 583; *Hackett v. Boston, C. & M. R. R. Co.*, 35 N. H. 390.

<sup>2</sup> *Winne v. Ill. Cent. R. R. Co.*, 31 Iowa, 583.

<sup>3</sup> *Mich. S. & N. Indiana R. R. Co. v. Caster*, 13 Ind. 164; *Holden v. New York Central R. R. Co.*, 54 N. Y. 662; *Blumenthal v. Brainerd*, 38 Vt. 402; *Kyle v. Laurens R. R. Co.*, 10 Richardson's Law, 382; *Union R. R. & Transp. Co. v. Traube*, 59 Mo. 355, 8 Am. Ry. Rep. 441. But see *Illinois Central R. R. Co. v. Hall*, 58 Ill. 409, 11 Am. Ry. Rep. 95, modifying the rule under the circumstances

of that case.

<sup>4</sup> *Pierce on Railways*, 451.

<sup>5</sup> *Tucker v. Pacific R. R.*, 50 Mo. 385; *Faulkner and others v. South Pacific R. R. Co.*, 51 Mo. 311; *Griffin v. Colver*, 16 N. Y. 489; *Ward et al. v. N. York Cent. R. R. Co.*, 47 N. Y. 29; *Medbury v. New York & Erie R. R. Co.*, 26 Barbour, 564; *Peet v. Chicago & Northwestern Ry. Co.*, 20 Wis. 594; *Galena & Chicago Union R. R. Co. v. Rae*, 18 Ill. 488; *Cutting v. Grand Trunk Ry. Co.*, 13 Allen, 381; *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 489; *Weston v. Grand Trunk Ry. Co.*, 54 Me. 376; *Newell*

difference in value, and not of market price, occasioned by the delay; that is, the diminution in value compared with the value on the day it should have arrived, as if less valuable by reason of deterioration in quality.<sup>1</sup>

In Massachusetts, the rule of damages for delay by the carrier in delivery of goods for an unreasonable time, is the diminution in value thereof, as articles of merchandise, at the time of delivery, caused by reason of the delay; not the difference in the prevailing market price of like goods on the day of arrival as compared with that existing at the time the goods should have arrived, but the depreciation or diminution in value of the articles themselves, occasioned by the delay, compared with what it would have been if the goods had promptly arrived—as, for instance, depreciation in value of perishable articles, or articles liable to deteriorate by time.<sup>2</sup>

But the measure of damages for failure to deliver in a reasonable time articles or property confided to a carrier for transportation is not in all cases and under all circumstances the same. The loss of the use of the articles is sometimes an element of damages, as where machinery for a party's own use is delayed in its carriage beyond a reasonable time, by reason whereof the owner is deprived, during such delay, of the use thereof, then the value of the use of such machinery for the time it is so unreasonably delayed in its carriage, and readiness to be delivered by the carrier, is the true measure of damages, supposing the property itself is uninjured, and is in good order on its delivery.<sup>3</sup> We mean by the value of the machinery during the delay, not what could have been earned by the use of it, nor yet the injury or

*v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100; and interest is to be allowed: *Newell v. Smith*, *supra*.

<sup>1</sup> *Ingledeu v. Northern R. R. Co.*, 7 Gray, 89; *Sangamon & Morgan R. R. Co. v. Henry*, 14 Ill. 156.

<sup>2</sup> *Ingledeu v. Northern R. R. Co.*, 7 Gray, 89; *Sangamon & Morgan R. R. Co. v. Henry*, 14 Ill. 156; *Sisson and another v. The Cleveland & Toledo R. R. Co. and another*, 14 Mich. 489. The rule in New York is different. There the depreciation in market price is the measure of damages:

*Griffin v. Colver*, 16 N. Y. 489; *Ward and another v. The New York Cent. R. R. Co.*, 47 N. Y. (2 Sickels), 29; *Kent v. Hudson River R. R. Co.*, 22 Barb. 278. And so in England: *Col-lard v. S. E. R. W. Co.*, 7 Hurl. & N. 79; *Wilson v. The Lancashire & Yorkshire R. W. Co.*, 9 Com. B. (N. S.), 632. In *Ward and another v. New York Cent. R. R. Co.*, *supra*, *Wibert v. The N. Y. & Erie R. R. Co.* is referred to, and regarded as not authority.

<sup>3</sup> *Priestly and another v. N. Indiana & Chicago R. R. Co.*, 26 Ill. 205, 207.

damages that may have resulted to the owner by the idleness of hands, or the hindrance and expense of business occasioned by the delay, but simply what such machinery could have been hired at, at a reasonable rent, for the length of time it was detained.<sup>1</sup> To enable the owner to recover for special damages of the nature above specified, as for the idleness of laborers and hindrance of business, and other injuries of like kind, they must be specially alleged and set out in the declaration or petition, and the allegations must be sustained by the proof.<sup>2</sup>

**8. For personal injury to plaintiff.**—In an action for a personal injury, the action being by the person injured, the measure of damages is not only the pain and suffering, loss and injury, already sustained, but also the disability, injury and suffering which will thereby be occasioned in the future.<sup>3</sup> To this, we may add, is to be added the expense of medical treatment necessarily incurred, together with compensation for loss of time,

<sup>1</sup> *Priestly and another v. N. Indiana & Chicago R. R. Co.*, 26 Ill. 205, 207. See *contra*, *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 46 Miss. 458.

<sup>2</sup> *Priestly and another v. N. Indiana & Chicago R. R. Co.*, 26 Ill. 205, 207. In an action for not delivering grain, shipped in bulk, to a particular warehouse, the measure of damages, irrespective of any statute, is the cost of moving the cars to the place required; but if the action is brought under the Illinois statute requiring such delivery, the depreciation in the price of the grain, specially authorized to be recovered by that statute (Rev. Stat. 1874, ch. 114, sec. 82), may be considered: *Chicago & Northwestern Ry. Co. v. Stanbro*, 87 Ill. 195, 18 Am. Ry. Rep. 180.

<sup>3</sup> *Pennsylvania R. R. Co. v. Books*, 57 Penn. St. 339, 345; *Pittsburg, Allegheny & Manchester Passenger R. W. Co. v. Donahue*, 70 Penn. St. 119; *Spicer v. The Chicago & N. Western Ry. Co.*, 29 Wis. 580; *Holyoke v. Grand Trunk Ry. Co.*, 48 N. H. 541; *Atlanta & Richmond Air Line R. R. Co. v. Wood*, 48 Ga. 565, 11 Am. Ry. Rep.

406; *Central R. R. & Banking Co. v. Kelly*, 58 Ga. 107, 16 Am. Ry. Rep. 114; *Chicago, Rock Island & Pacific R. R. Co. v. Payzant*, 87 Ill. 125, 18 Am. Ry. Rep. 200; *Ohio & Miss. Ry. Co. v. Dickerson*, 59 Ind. 317; *Town of Elkhart v. Ritter*, 66 Ind. 136; *South & N. Ala. R. R. Co. v. McLendon*, 10 Repr. 688; *Klein v. Jewett*, 11 C. E. Green, 474; *Jewett v. Klein*, 12 *Id.* 550; *Morris v. C., B. & Q. R. R. Co.*, 45 Ia. 29; *Quigley v. Cent. Pac. R. R. Co.*, 11 Nev. 350; *Cohen v. Eureka & P. R. R. Co.*, 14 Nev. 376; *Bradshaw v. Lancashire & Y. Ry. Co.*, Law Rep. 10 C. P. 189; *Phillips v. London & South Western Ry. Co.*, Law Rep. 4 Q. B. Div. 406; *S. C. 5 Id.* 78, and *L. R. 5 C. P. Div. 280*. Evidence may be given of the plaintiff's occupation, and the effect of the injury upon his capacity to perform it: *Grand Rapids & Ind. R. R. Co. v. Martin*, 41 Mich. 667; *Elkhart v. Ritter*, *supra*; also of his earnings: *Simonson v. C., R. I. & P. Ry. Co.*, 49 Ia. 87; *Kline v. Kansas City, St. Jos. & C. B. R. R. Co.*, 50 Ia. 656; *Nash v. Sharpe*, 19 Hun. 365; *Phillips v. L. & S. W. Ry. Co.*, *supra*.



if any.<sup>1</sup> But to enable the plaintiff to recover more than merely compensatory damages, in the ordinary sense, the foundation therefor must be laid in the petition or declaration.<sup>2</sup>

In an action for damages for a personal injury, evidence can not be given of charitable subscriptions, donations or contributions made to the plaintiff subsequent to, and by reason of, the injury. These circumstances are not to be permitted to enter into the consideration of the jury in arriving at the measure of damages, and may not be taken into account to diminish the amount of recovery.<sup>3</sup> To hold otherwise, would be to give to the defendant in the action, instead of to the injured party, the benefit of such fruits of benevolence; and it would be just as reasonable, on the other hand, to enhance the amount of the recovery or finding of the jury because no good gifts had been made. These things are not to be considered either way.

Among the considerations for which damages may be given are physical pain suffered by the party injured, when he himself is plaintiff, expenses of nursing, loss of time, and of medical attendance. But in allowing for pain and suffering, the effect of sympathy is to be guarded against, as also any extravagant allowance; and in cases calling only for compensatory damages, feelings of sympathy, compassion and charity are elements improper to enter into the making up of the verdict, as calculated to mislead. The same rule is to be adopted, too, whether the parties be rich or poor, or are natural persons or corporate bodies, which latter are persons in law. The law is in this respect the same unto all men and to all persons, natural and corporate, rich and poor.<sup>4</sup>

But plaintiff's counsel fees can not be proven: *Houston & Tex. Ry. Co. v. Oram*, 49 Tex. 341.

<sup>1</sup> *Pennsylvania R. R. Co. v. Books*, 57 Penn. St. 339, 345; *Norristown v. Moyer*, 67 Penn. St. 355; *Central R. R. & B. Co. v. Kelly*, *supra*.

<sup>2</sup> *Deppe v. Chi., Rock Isld. & Pacific R. R. Co.*, 36 Iowa, 52, 60; *Tomlinson v. Derby*, 43 Conn. 562.

<sup>3</sup> *Norristown v. Moyer*, 67 Penn. St. 355. But when the plaintiff, a physician, claims compensation for inability to practice his profession, the defendant may show that his practice was

unlawful, and his general reputation as to this: *Jacques v. Bridgeport Horse R. R. Co.*, 41 Conn. 61, 6 Am. Ry. Rep. 1.

<sup>4</sup> *Norristown v. Moyer*, 67 Penn. St. 355; *Quigley v. Cent. Pac. R. R. Co.*, 11 Nev. 350. But where the court instructed the jury they might include "the injury to his (plaintiff's) pride, his manhood," it was held to refer to the character of the injury—it appearing that thereby plaintiff was permanently deformed—and was therefore not erroneous: *Atlanta & Richmond*

The Supreme Court of Missouri say that the proposal to call in surgeons, during the progress of a trial, to examine plaintiff as to the extent of her injuries, is unknown to the law of that state, and the court has no power to enforce such an order.<sup>1</sup> In Iowa, however, on motion, the defendant is entitled to an order of court for such examination.<sup>2</sup>

The opinion of the plaintiff as to the extent of the damage suffered by him, is incompetent evidence.<sup>3</sup>

There can be but one recovery for a personal injury, which includes all damages sustained and prospective, and is a bar to another recovery.<sup>4</sup>

An action to recover damages for a personal injury not resulting in death is a common law proceeding in Kentucky, and it is there held that punitive damages are recoverable if the company has failed to use diligence in keeping its works in repair.<sup>5</sup> The absence of slight care in the management of a train, or in keeping the track in repair, is gross negligence. It is not necessary to show the absence of all care, or a reckless indifference to the safety of passengers, or intentional misconduct.<sup>6</sup>

**9. For personal injury causing death.**—It is difficult to place a pecuniary estimate upon human life, or to arrive at any fixed rule of damages in such cases. The current, and we think we may say the settled, authority is, that the pecuniary loss suffered by the parties entitled to the sum to be recovered, is the correct measure of damages for a personal injury causing death.<sup>7</sup>

*Air Line R. R. Co. v. Wood*, 48 Ga. 565, 11 Am. Ry. Rep. 406.

<sup>1</sup>*Loyd v. Hannibal & St. Joseph R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474.

<sup>2</sup>*Schroeder v. Chicago, Rock Island & Pacific R. R. Co.*, 47 Ia. 375, 14 Am. Ry. Rep. 359.

<sup>3</sup>*Central R. R. & Banking Co. v. Kelly*, 58 Ga. 107, 16 Am. Ry. Rep. 114.

<sup>4</sup>*Town of Elkhart v. Ritter*, 66 Ind. 136; *South & N. Ala. R. R. Co. v. McLendon*, 10 Repr. 688.

<sup>5</sup>*Maysville & Lexington R. R. Co. v. Herrick*, 13 Bush, 122, 17 Am. Ry. Rep. 53.

<sup>6</sup>*M. & L. R. R. Co. v. Herrick*. And see *post*, title Punitive Damages, this chapter. Where the verdict is for the defendant, judgment will not be reversed because the court omitted to charge the jury as to the measure of damages: *Moran v. Nashville & Chattanooga R. R. Co.*, 58 Tenn. 379, 21 Am. Ry. Rep. 192.

<sup>7</sup>*Penn. R. R. Co. v. Zebe*, 33 Penn. St. (9 Casey), 318; *Penn. R. R. Co. v. Vandever*, 36 Penn. St. (12 Casey), 298; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335, 338; *Coakley v. North. Penn. R. R. Co.*, 5 Penn. L. J. 444, 6 Am. Law Reg.

That loss is said to be what the deceased would have probably accumulated by his intellectual or bodily labor in his profession or business during his lifetime, and which would have gone to those entitled to the proceeds of a recovery sought to be had, taking into consideration the age, ability, disposition as to industry, and also the habits of life and expenditure of living, of the deceased.<sup>1</sup> But nothing is to be allowed for the bodily suf-

355; *Mansfield Coal & C. Co. v. McEnery*, 91 Penn. St. 185; S. C. 37 Leg. Int. 28; *Chi. & Alton R. R. Co. v. Shannon*, Adm'r, 43 Ill. 338; Ill. Cent. R. R. Co. v. *Weldon*, Adm'r, 52 Ill. 290; Ill. Cent. R. R. Co. v. *Baches*, 55 Ill. 379; *Chicago & Alton R. R. Co. v. Becker*, 76 Ill. 25; *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 80 Ill. 88; *Lake Shore & Mich. Southern Ry. Co. v. Sunderland*, 2 Bradw. (Ill.), 307; *Telfer v. The Northern R. R. Co.*, 1 Vroom, 188; *Balt. & O. R. R. Co. v. The State*, use of *Kelley et als.*, 24 Md. 271, 281; *Balt. & O. R. R. Co. v. The State*, use of *Woodward*, 41 Md. 268; *Macon & Western R. R. Co. v. Johnson*, 38 Ga. 409; *Rose v. Des Moines Valley Ry. Co.*, 39 Ia. 246, 9 Am. Ry. Rep. 7; *Kansas Pacific Ry. Co. v. Cutter*, 19 Kans. 83, 17 Am. Ry. Rep. 471; *Collins v. East Tenn., Va. & Ga. R. R. Co.*, 9 Heisk. 841, 20 Am. Ry. Rep. 46; *Holmes v. Oregon & Cal. R. R. Co.*, 7 Sawyer, 380; S. C. 5 Fed. Repr. 528, 1 Am. & Eng. R. R. Cas. 623; *Burton v. Wilmington & Weldon R. R. Co.*, 82 N. Car. 504; *Little Rock & Ft. Smith Ry. Co. v. Barker*, 33 Ark. 350. The rule in Colorado is stated to be that where the statute prescribes no measure of damages, that ordinarily applicable in like cases at common law will govern: *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245. Punitive damages are allowed by the Alabama statute: *Savannah & Memphis*

*R. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.

<sup>1</sup>*Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335, 338; Ill. Cent. R. R. Co. v. *Weldon*, 52 Ill. 290; *Chicago & N. W. R. R. Co. v. Moranda*, 93 Ill. 302; *Balt. & O. R. R. Co. v. State*, use of *Kelley*, 24 Md. 271, 281; *Balt. & O. R. R. Co. v. The State*, use of *Woodward*, 41 Md. 268; *Collins v. E. T., V. & G. R. R. Co.*, *supra*; *Burton v. W. & W. R. R. Co.*, *supra*; *Kans. Pac. Ry. Co. v. Lundin*, 3 Col. 94; *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Col. 1, 162; *Balt. & Ohio R. R. Co. v. Noell*, 32 Gratt. 394. The allowance, if for minors, is estimated as till their majority; if for the widow, it is estimated for the term of her probable life: *Balt. & O. R. R. Co. v. State*, use of *Trainor*, 33 Md. 542. To this well settled and just rule of law the court added, in its instructions to the jury, in *The Pennsylvania R. R. Co. v. McCloskey's Adm'r*, 23 Penn. St. (11 Harris), 526, as law, the following unwarranted and extraordinary assumption, to wit: "But if the jury can find a better rule than the one suggested, they are at liberty to adopt it;" which was sustained by the Pennsylvania Supreme Court, *LOWRIE, J.*; Justices *BLACK* and *WOODWARD* dissenting. See, in this connection, *Kansas Pacific Ry. Co. v. Miller*, *supra*.

fering of deceased, or for distress of mind of such surviving beneficiaries, occasioned by his death.<sup>1</sup>

In actions for personal injury resulting in death, evidence of the probable period or length of the life of the deceased, estimated by reference to and in accordance with the principles and rules laid down in recognized American life-tables, is properly admissible, in aid of ascertainment of the damages.<sup>2</sup>

Where the jury find a certain sum as the pecuniary loss sustained, it will be allowed to stand even though it may not be strictly consistent with a special finding by them as to the amount of loss, or the manner thereof.<sup>3</sup>

There must be proof of damage in order to sustain more than a nominal verdict;<sup>4</sup> but pecuniary loss may be inferred by the jury if there is proof of the age, character and capacity of the deceased, and of the relations sustained by him toward the beneficiaries.<sup>5</sup>

The rule of damages in Georgia is, where the widow sues for the death of the husband, and no negligence or fault is shown in

<sup>1</sup> Penn. R. R. Co. v. Zebe, 33 Penn. St. (9 Casey), 318; Penn. R. R. Co. v. Vandever, 36 Penn. St. (12 Casey), 298; Pennsylvania R. R. Co. v. Henderson, 51 Penn. St. 315, 323; Pennsylvania R. R. Co. v. Butler, 57 Penn. St. 335, 338; Coakley v. North Penn. R. R. Co., 5 Penn. Law Journal, 444; Ohio & Miss. R. R. Co. v. Tindall, 13 Ind. 366; Chi. & Alton R. R. Co. v. Shannon, Adm'r, 43 Ill. 338; Ill. Cent. R. R. Co. v. Weldon, 52 Ill. 290; Nashville & Chattanooga R. R. Co. v. Stevens, 9 Heisk. 12, 19 Am. Ry. Rep. 363; Collins v. East Tenn., Va. & Ga. R. R. Co., 9 Heisk. 841, 20 Am. Ry. Rep. 46; Kansas Pacific Ry. Co. v. Miller, 2 Col. 442, 20 Am. Ry. Rep. 245. Sec. 2291 of the Tennessee Code does not give compensation for grief of the wife, but does for bodily and mental suffering of the deceased, and damages resulting to the beneficiaries: N. & C. R. R. Co. v. Stevens, Collins v. E. T., V. & G. R. R. Co., *supra*; Fowlkes v. Nashville & Decatur R.

R. Co., 5 Baxt. 663.

<sup>2</sup> O'Donnell v. O'Donnell's Exec'rs, 3 Bush (Ky.), 216; Alexander's Exec'x v. Bradley, 3 Bush, 667; Louisville, Cincinnati & Lexington R. R. Co. v. Mahony's Adm'x, 7 Bush (Ky.), 235, 238; Sauter v. N. Y. Cent. & Hudson River R. R. Co., 66 N. Y. 50, 6 Hun, 446; Walters v. C., R. I. & P. R. R. Co., 36 Ia. 458; S. C. 41 Ia. 71; Balt. & Ohio R. R. Co. v. Noell, 32 Gratt. 394; Kansas Pac. Ry. Co. v. Lundin, 3 Col. 94; Denver, S. P. & P. Ry. Co. v. Woodward, 4 Col. 1.

<sup>3</sup> Kansas Pacific Ry. Co. v. Cutter, 19 Kans. 83, 17 Am. Ry. Rep. 471.

<sup>4</sup> McIntyre v. N. Y. Cent. R. R. Co., 37 N. Y. 287; Mitchell v. N. Y. Cent. & H. R. R. Co., 2 Hun, 535; Chicago & Alton R. R. Co. v. Shannon, 43 Ill. 338; Ill. Cent. R. R. Co. v. Weldon, 52 Ill. 290.

<sup>5</sup> Cornwall v. Mills, 44 N. Y. Superior, 45; Rockford, Rock Island & St. Louis R. R. Co. v. Delaney, 82 Ill. 198.

the conduct of the deceased in connection with the injury, to ascertain what is a reasonable support of the widow, according to the condition, habits, character and occupation in life of the husband: and when so found, give the value of this *in presenti*, as ascertainable by the life-tables, according to the expectancy of her life. The result of this finding or conclusion is the proper measure of damages in such cases in Georgia.<sup>1</sup>

**10. To parent, for injury to minor child.**—If the action be by the father for injury to his minor child, the measure of damages is to be a fair compensation for the loss of service occasioned by the injury, as also remuneration for the necessary expenses of nursing and medical attendance, if any such are incurred by the plaintiff.<sup>2</sup> If death has ensued from the injury, then the loss of service is to be estimated during the time the deceased, if he had lived, would have been in a state of minority.<sup>3</sup> In case death does not result from the injury, then the service is to be estimated from the time lost by reason of the injury, not, however, beyond the time of the injured person's arrival at his majority. And though death ensue from the injury, damages may not be allowed to the parent except for the reasonable and just expectation of life prior to attaining majority. The possibility of the deceased having survived and afforded filial aid beyond that period, had he not been injured, is too remote to be taken into account in the assessment of damages for the death.<sup>4</sup> But where the deceased child is above the age of twenty-one, if any evidence is produced tending to show a reasonable expectation of pecuniary advantage accruing to the plaintiffs (mother and father), and which is destroyed by the loss of the son, it should be submitted to the jury to determine.<sup>5</sup>

The fact that a widow was not entirely dependent upon her husband for support during his lifetime, does not affect her right of recovery.<sup>6</sup>

<sup>1</sup> *Macon & Western R. R. Co. v. Johnson*, 38 Geo. 409.

<sup>2</sup> *The Pennsylvania R. R. Co. v. Kelly*, 31 Penn. St. (7 Casey), 372; *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St. 318; *Oakland R. W. Co. v. Fielding*, 48 Penn. St. (12 Wright), 320; *Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind. 366; *The State, use of Coughlan*,

*v. Balt. & O. R. R. Co.*, 24 Md. 102.

<sup>3</sup> *The State, use of Coughlan, v. Balt. & O. R. R. Co.*, 24 Md. 102.

<sup>4</sup> *The State, for use of Coughlan, v. Balt. & O. R. R. Co.*, 24 Md. 102.

<sup>5</sup> *North Penn. R. R. Co. v. Kirk*, 90 Penn. St. 15; *S. C. 1 Am. & Eng. R. R. Cas.* 45.

<sup>6</sup> *Denver, S. P. & P. Ry. Co. v.*

**11. For conversion of, or failure to deliver, stock.**—The measure of damages in an action for failure to replace or return borrowed stocks, is the highest market price thereof from the time the defendant was bound to deliver the same up to the time of the trial.<sup>1</sup> But the rule in Illinois is the actual market price of the stocks at the time of conversion of the same.<sup>2</sup>

**12. For injury to personal property.**—The measure of damages for injuries by a railroad company to personal property, as a mere act of negligence unaccompanied with intentional wrong, is compensation—that is, such sum as will make the injured party whole, by repairing the injury and compensating, also, for the direct loss occasioned thereby.<sup>3</sup>

In the case here cited from 4th Indiana, the injury was done to the wagon of the complainant at a depot of defendant, where it was for the purpose of receiving and removing away some freight which was coming in on the train, and which plaintiff had come there to receive. The wagon being disabled and the trip lost, the court held the measure of damages to be the value of the damage done to the wagon, the lost value of the trip in which plaintiff was engaged, and the value of the use of the wagon for a reasonable time in which to have the same repaired.<sup>4</sup>

**13. For breach of right of way contract.**—The measure of damages for a breach of contract to convey land to a railroad company for its right of way, is the increased difference, if any, between the price agreed upon in the contract and the amount of assessment money which the company has to subsequently pay to procure the same right of way by assessment under the statute.<sup>5</sup> This is the amount which will in such case make the company whole. This is compensation.

Where a landowner conveys the right of way through his lands for a nominal sum, and also in consideration that the rail-

Woodward, 4 Col. 1, 162. See *Phillips v. London & S. W. Ry. Co.*, Law Rep. 5 C. P. Div. 280; S. C. L. R. 4 Q. B. Div. 406, and 5 *Id.* 78.

<sup>1</sup> *Bank of Montgomery v. Reese*, 2 Casey (26 Penn. St.), 147; *Musgrave v. Beckendorff*, 53 Penn. St. 310, 312; *West v. Pritchard*, 19 Conn. 212; *Romaine v. Van Allen*, 12 Smith (26

N. Y.), 309; *Clark v. Pinney*, 7 Cow. 687.

<sup>2</sup> *Sturges and others v. Keith*, 57 Ill. 451.

<sup>3</sup> *Shelbyville Lateral Branch R. R. Co. v. Lewark*, 4 Ind. 471.

<sup>4</sup> 4 Ind. 471, 473.

<sup>5</sup> *Western R. R. Co. v. Babcock*, 6 Met. 346.

road company should erect a depot upon designated grounds sold by such landowner to the company at a given price, upon failure of the company to perform by building of the depot, it becomes liable in damages to such landowner; and the true measure of damages, in an action for such breach of contract, is not the amount which the right of way would have been assessed at if condemned under the statute, but is the amount or sum of money in which the adjacent lands of such owner would have been increased in value if the contract were complied with, added to the fair value of the right of way.<sup>1</sup> These two together, as an aggregate sum, form the measure of damages in such action; and the value of the right of way is to be ascertained in the usual manner, by estimating the difference in value of the land before and after the building of the road, considering all proximate advantages and disadvantages to the owner, not common to others.<sup>2</sup>

**14. Refusing to permit transfer of capital stock.**—In an action against the company by the buyer for refusing to permit a transfer, and refusal to make a delivery of, stock, the measure of damages is the value of the stock at the date of making a demand for it, and not as of the time of trial.<sup>3</sup>

**15. For wrongful expulsion from cars.**—The true measure of damages for wrongfully expelling a party from the cars, where the act is unaccompanied with aggravating circumstances or wantonness on the part of the company, is the actual loss and damage sustained by the party by reason of his expulsion.<sup>4</sup> The

<sup>1</sup> *Watterson v. Allegheny Valley R. Co.*, 74 Penn. St. 208.

<sup>2</sup> *Watterson v. Allegheny Valley R. Co.*, 74 Penn. St. 208. In this estimate, profits of business are not to be considered; but the increased value of the land as a place of business may be considered as a benefit to have resulted from the depot and station, if erected in fulfillment of the contract: *Id.*

<sup>3</sup> *Pinkerton v. The Manchester & Lawrence R. R. Co.*, 42 N. H. 424; *Baltimore City Pass. Ry. Co. v. Sewell*, 35 Md. 238; *Hussey v. Manfrs. & Mech. Bank*, 10 Pick. 415; *Wyman*

*v. Am. Powder Co.*, 8 Cush. 168; *Sewall v. Boston W. P. Co.*, 4 Allen, 277.

<sup>4</sup> *Mil. & Miss. R. R. Co. v. Finney*, 10 Wis. 388; *Hamilton v. Third Avenue R. R. Co.*, 53 N. Y. 25, 5 Am. Ry. Rep. 362. But see *Hays v. Houston G. N. R. R. Co.*, 46 Tex. 272, 13 Am. Ry. Rep. 281, where it is said the jury may consider the injuries sustained by the plaintiff in his feelings, his person and his estate, and his situation in life and reputation, and any circumstances attending the act; but not his property, or the wealth of the defendant. And see *Philadelphia*,

action in such cases is in its nature *ex contractu*, as the expulsion, if wrongful, results in a violation of the contract for the passage of the party.<sup>1</sup> Vindictive damages are not allowable in such case, unless for acts accompanied with maliciousness, brought home to the intent of the company.<sup>2</sup> It is no defense to such an action that the wrong act was willful on the part of the conductor, for the ground of action is the breach of the contract of carriage, and the conductor being the agent of the company to carry it out, it therefore results that the breach is none the less actionable because he may have failed in his duty from improper motives.<sup>3</sup> It is unlike an action in tort for a wrong and violence unnecessarily inflicted by an agent outside of his authority.

For putting a passenger off the cars, contrary to the statute,<sup>4</sup> betwixt stations, who wantonly refuses to pay fare and claims to ride free, the true measure is nominal damages, if no more is done than simply to eject him, and no indignities or violence are unnecessarily offered him. The only wrong being the expelling of the passenger at an improper place, as between stations, the law affords therefor merely nominal damages.<sup>5</sup> But if the expulsion be accompanied with willful wrong or violence on the part of the conductor as to the manner of putting off the train, and

Wilmington & Baltimore R. R. Co. v. Larkin, 47 Md. 155, 18 Am. Ry. Rep. 536.

<sup>1</sup> Mil. & Miss. R. R. Co. v. Finney, 10 Wis. 388.

<sup>2</sup> Mil. & Miss. R. R. Co. v. Finney, 10 Wis. 388; Du Laurans v. First Div. St. Paul & Pac. R. R. Co., 15 Minn. 49; Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25, 5 Am. Ry. Rep. 362; Parker v. Long Island R. R. Co., 13 Hun, 319; Hays v. Houston G. N. R. R. Co., 46 Tex. 272; Edelmann v. St. Louis Transfer Co., 3 Mo. App. 503. And where vindictive damages are, or might be, claimed, evidence by the servant ejecting the plaintiff as to his good faith in so doing, is proper: Yates v. New York Central & Hudson River R. R. Co., 67 N. Y. 100, 15 Am. Ry. Rep. 137. And

even if the admission of such testimony be considered erroneous, if the jury have found against a cause of action, the judgment will not be reversed for that reason: *Ibid*.

<sup>3</sup> Mil. & Miss. R. R. Co. v. Finney, 10 Wis. 388; Weed v. Panama R. R. Co., 17 N. Y. 362; Sherley v. Billings, 8 Bush, 147; Goddard v. Grand Trunk Ry. Co., 57 Me. 202. And so where the conductor employs assistants to aid in expelling a passenger, the company will be liable for injury caused by their unjustifiable force, although contrary to the conductor's orders: Coleman v. New York & New Haven R. R. Co., 106 Mass. 160, 6 Am. Ry. Rep. 306.

<sup>4</sup> Chicago, B. & Q. R. R. Co. v. Parks, 18 Ill. 460.

<sup>5</sup> Terre Haute, Alton & St. Louis R.



in discharge of that duty, then exemplary damages may be given.<sup>1</sup>

It is a question of fact for the jury whether blows are struck in the exercise of justifiable force to effect an expulsion, and overcome force with which the passenger is resisting it, and whether more force is used than is necessary; and the jury should be intelligibly instructed that the plaintiff has no right to resist expulsion if he is wrongfully on the cars.<sup>2</sup> And if the railroad company, by using excessive violence, aggravate an incipient disease of the passenger, it is no defense that they were not cautioned about it.<sup>3</sup> And the question whether the force aggravated the disease is also for the jury.<sup>4</sup>

In a case where a person, after being thrown from a car upon the ground, got up again, pursued and overtook the car, walked a considerable distance that evening, worked on the following day, and no external injury could be perceived, although there was doubt as to the nature and extent of the internal injuries (which, however, were not of a nature to impair plaintiff's means of earning a livelihood), twelve thousand dollars damages were held to be grossly excessive.<sup>5</sup> In this case it was also held that where the conductor is made a co-defendant, evidence of the pecuniary ability of the company in aggravation of damages is improper.<sup>6</sup>

**16. For breach of contract to construct railroad.**—In an action by a contractor against a railroad company, for a breach of contract of construction by an unauthorized suspension of the

*R. Co. v. Vanatta*, 21 Ill. 188; *Chicago & Alton R. R. Co. v. Roberts*, 40 Ill. 503. And see *Brown v. Mo., Kans. & Tex. Ry.*, 64 Mo. 536, 17 Am. Ry. Rep. 242, where the pass had been obtained by misrepresentations.

<sup>1</sup>*Chi., Rock Isld. & Pacific Ry. Co. v. Herring*, 57 Ill. 59; *Kansas Pacific Ry. Co. v. Kessler*, 18 Kans. 523, 15 Am. Ry. Rep. 338; *Philadelphia, Wilmington & Baltimore R. R. Co. v. Larkin*, 47 Md. 155, 18 Am. Ry. Rep. 536; and this, too, though the plaintiff may have rendered himself liable to be ejected from the cars by his disorderly conduct: *P., W. & B. R. R. Co.*

*v. Larkin*, *supra*.

<sup>2</sup>*Coleman v. New York & New Haven R. R. Co.*, 106 Mass. 160, 6 Am. Ry. Rep. 306.

<sup>3</sup>*Coleman v. N. Y. & N. H. R. R. Co.*, *supra*.

<sup>4</sup>*Ibid*.

<sup>5</sup>*Chicago City Ry. Co. v. Henry*, 62 Ill. 142, 6 Am. Ry. Rep. 365. But eight hundred dollars held not excessive, in *Kansas Pacific Ry. Co. v. Kessler*, *supra*.

<sup>6</sup>*Chi. City Ry. Co. v. Henry*, *supra*. And see *Toledo, W. & Western Ry. Co. v. Smith*, 57 Ill. 517, 10 Am. Ry. Rep. 445.

work, the difference between the amount such contractor was, by his contract, to receive of the railroad company for the work, and the amount contracted by him to pay for the same work to a sub-contractor, is not the measure of damages.<sup>1</sup> Moreover, evidence of such difference is not legal testimony for the jury.<sup>2</sup>

The measure of damages in an action by a contractor against a railroad corporation for the breach of an executory agreement to let a contract of construction of a portion of its road, is the same as if, the contract having been fully executed, the company thereafter broke the same by refusing to allow the performance thereof by the contractor, and by refusing to perform on its part.<sup>3</sup>

Although generally future profits can not be allowed in estimating damages, yet where labor is to be performed on which profits will arise as the direct result of the work done at a contract price, and the contractor is prevented from earning such profit by the wrongful act of the company, such damages may be estimated.<sup>4</sup> The probable cost of completion of the contract may be established by proof of the value of the material, labor and skill required;<sup>5</sup> and for this purpose expert testimony is admissible.<sup>6</sup>

The witnesses must estimate the cost of labor and materials as of the date of the breach of the contract, which is the time when the cause of action accrues.<sup>7</sup> From that time the contractor performs no more labor, and assumes no further risk. These things should be considered by the jury, and to that extent it may be held that the rule of damages is limited—that the difference between the cost of doing the work, and the price to be paid for it, is the measure of damages.<sup>8</sup>

**17. Breach of contract of carriage.**—For the breach of a contract of carriage of passengers, damages can not be recovered for annoyance and vexation of mind, or mental distress and sense

<sup>1</sup> *Story v. New York & Harlem R. R. Co.*, 6 N. Y. (2 Selden), 85; *Master-ton v. The Mayor et al. of Brooklyn*, 7 Hill, 61. And see *Waco Tap R. R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ry. Rep. 233.

<sup>2</sup> *Story v. New York & Harlem R. R. Co.*, 6 N. Y. (2 Selden), 85; *Master-ton v. The Mayor, etc., of Brook-*

*lyn*, 7 Hill, 61.

<sup>3</sup> *Pratt v. The Hudson River R. R. Co.*, 21 N. Y. (7 Smith), 305.

<sup>4</sup> *Waco Tap R. R. Co. v. Shirley*, 45 Tex. 355, 13 Am. Ry. Rep. 233.

<sup>5</sup> *Waco Tap R. R. Co. v. Shirley*.

<sup>6</sup> *Waco Tap R. R. Co. v. Shirley*.

<sup>7</sup> *Waco Tap R. R. Co. v. Shirley*.

<sup>8</sup> *Waco Tap R. R. Co. v. Shirley*.

of wrong, even though the breach is willful;<sup>1</sup> but loss of time, and such personal inconvenience as is the immediate consequence of the breach of contract, are proper elements of damage.<sup>2</sup>

The measure of damages in an action for breach of a special contract to carry freight at fixed rates, is the difference between the market price of the goods refused to be carried at the place of shipment and the place of destination, less the charges agreed upon.<sup>3</sup> Anticipated profits from contracts subsequently made can not be included, although at the time of making the agreement the carrier was notified that the shipper wished to make such contracts.<sup>4</sup>

**18. For breach of other contracts.**—Under a contract in which the plaintiff agreed to run a stage line between certain points, in consideration of which the railroad company granted the exclusive right of ticketing between such points for a term of years, it was held that plaintiff was not entitled to damages suffered in the steamboat business between intervening points by reason of its breach.<sup>5</sup> Upon such a contract the measure of damages is not the difference between the contract price for carrying passengers and the cost of transportation, but is the profits plaintiff was in fact able to make, taking into account the situation and use of his property in the transportation of other passengers, and the carrying on of other and distinct business over the same route.<sup>6</sup>

**19. Punitive damages.**—There is a species of enhanced damages, over and above the ordinary measure of compensation, that are given in the interest of the public, and not as a matter of right to the injured party, where the conduct of the defendant in reference to the infliction of the injury is so grossly negligent, malicious, or wanton, as, in view of the public good, to call for punishment by way of example. These are sometimes referred to as "punitive," sometimes as "exemplary," and sometimes as "vindictive," damages. To authorize the inflic-

<sup>1</sup> *Walsh v. Chicago, Milwaukee & St. Paul Ry. Co.*, 42 Wis. 23, 15 Am. Ry. Rep. 71.

<sup>2</sup> *Walsh v. C., M. & St. P. Ry. Co.*

<sup>3</sup> *Harvey v. Conn. & Passumpsic Rivers R. R. Co.*, 124 Mass. 421, 18

Am. Ry. Rep. 9.

<sup>4</sup> *Harvey v. Conn. & P. Rivers R. R. Co.*

<sup>5</sup> *Frye v. Maine Cent. R. R. Co.*, 67 Me. 414, 16 Am. Ry. Rep. 363.

<sup>6</sup> *Ibid.*

tion of such damages, the jury must find from the evidence something more against the defendant than mere want of ordinary care. It must appear that the defendant was guilty of either fraud, malice, wantonness, violence, gross want of care, oppression, or other wrong act or intent.<sup>1</sup>

But to authorize such finding of vindictive damages, the improper conduct and intent on which the finding is to be predicated must be that of the principal. It is not sufficient that such be the conduct and wrong of a mere servant, unless the principal be by the evidence connected in some manner therewith.<sup>2</sup>

Or, in other words, the master or employer is not liable in punitive damages unless his own wrong act, default or negligence be connected in some manner therewith; as if the conduct of the servant be in obedience to the direction of, or be ratified by, the master, as by retaining him in his employment, or

<sup>1</sup> *Chicago & Rock Isl'd R. R. Co. v. McKean*, 40 Ill. 218; *City of Chicago v. Martin*, 49 Ill. 245; *Chicago, Rock Isl'd & Pacific Ry. Co. v. Herring*, 57 Ill. 59; *Toledo, Peoria & Warsaw R. R. Co. v. Patterson*, 63 Ill. 304; *Chicago, Burlington & Quincy R. R. Co. v. Bryan*, 90 Ill. 126; *Ackerson v. The Erie Ry. Co.*, 3 Vroom (N. J.), 254; *Louisville, Cin. & Lex. R. R. Co. v. Adm'r of Case*, 9 Bush (Ky.), 728; *Atlantic & Great Western Ry. Co. v. Dunn*, 19 Ohio St. 162; *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U. S. 489, 6 Am. Ry. Rep. 512; *Hays v. Houston G. N. R. R. Co.*, 46 Tex. 272, 13 Am. Ry. Rep. 281; *Kansas Pacific Ry. Co. v. Kessler*, 18 Kans. 523, 15 Am. Ry. Rep. 338; *Same v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245; *Hanson v. European & N. Am. Ry. Co.*, 62 Me. 84; *Ames v. Hilton*, 70 Me. 36; *Balt. & Y. Turnp. Co. v. Boone*, 45 Md. 344; *Phil., Wilm. & Balt. R. R. Co. v. Larkin*, 47 Md. 155; *South & N. Ala. R. R. Co. v. McLendon*, 10 Repr. 688; *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App.

503; *Quigley v. Cent. Pac. R. R. Co.*, 11 Nev. 350. In Iowa, an averment of such facts as justify a recovery of punitive damages is necessary: *Johnson v. C., R. I. & P. Ry. Co.*, 51 Ia. 25.

<sup>2</sup> *Townsend v. The New York Cent. & Hudson River R. R. Co.*, 56 N. Y. 295; *Cleghorn v. The New York Cent. & Hudson River R. R. Co.*, 56 N. Y. 44; *Ackerson v. The Erie Ry. Co.*, 3 Vroom (N. J.), 254; *Hopkins v. Atlantic & St. Lawrence R. R. Co.*, 36 N. H. 9; *Taylor v. Grand Trunk Ry. Co.*, 48 Ib. 304; *Craker v. Chicago & Northwestern Ry. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118; *Bass v. Same*, 42 Wis. 654, 15 Am. Ry. Rep. 45; *Milwaukee & St. Paul Ry. Co. v. Arms*, *supra*. The failure of a conductor to assist or rescue a passenger assaulted by riotous and disorderly persons improperly permitted on the train, will not authorize the giving of punitive or exemplary damages: *New Orleans, St. Louis & Chicago R. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308.

in some manner induced or influenced by his or the company's conduct.<sup>1</sup> Therefore, in an action for injuries occasioned by the negligence or wrongful act of an employe or servant, evidence is competent and proper to show that the servant was employed with knowledge of his bad habits of drunkenness or other faults, or with so little care that such faults, though existing, were not discovered, when they might have been known by ordinary care; or that, knowing the unfitness, the master or employer retained him in his service.<sup>2</sup> On the question of punitive damages for personal injury, evidence of gross carelessness of the defendant, and other circumstances aggravating the defendant's conduct, as also evidence of physical suffering of the plaintiff, is admissible.<sup>3</sup>

The rule laid down in the Supreme Court of Illinois, in actions for personal injuries, is that "juries may give exemplary or punitive damages in cases of wilful negligence or malice, but it is requisite such a case must be made."<sup>4</sup> Again: "To authorize the giving of exemplary or vindictive damages, either malice, violence, oppression or wanton recklessness must mingle in the controversy. The act complained of must partake of a

<sup>1</sup> *Caldwell v. N. Jersey Steamboat Co.*, 47 N. Y. 282; *Cleghorn v. The New York Cent. & Hudson River R. Co.*, 56 N. Y. (11 Sickels), 44; *Townsend v. N. York Cent. & Hudson River R. Co.*, 56 N. Y. 295; *Parker v. Long Island R. R. Co.*, 13 Hun, 319; *Bass v. Chicago & Northwestern Ry. Co.*, 39 Wis. 636, 13 Am. Ry. Rep. 414; *S. C.* 42 Wis. 654, 15 Am. Ry. Rep. 45; *Nashville & Chattanooga R. Co. v. Starnes*, 9 Heisk. 52, 19 Am. Ry. Rep. 280; *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503.

<sup>2</sup> *Cleghorn v. New York Cent. & Hudson River R. R. Co.*, 56 N. Y. 44.

<sup>3</sup> *Cooper v. Mullins*, 30 Geo. 146.

<sup>4</sup> *Bull v. Griswold*, 19 Ill. 631; *Peoria Bridge Assn. v. Loomis*, 20 Ill. 235; *Foote v. Nichols*, 28 Ill. 486; *Hawk v. Ridgway*, 33 Ill. 473; *Chicago & Rock Isl'd R. R. Co. v. McKean*, 40 Ill. 218, 235; *Toledo, Peoria & Warsaw R. R. Co. v. Patterson*, 63 Ill. 304; *Chicago, Burlington & Quincy R. R. Co. v. Bry-*

*an*, 90 Ill. 126. See, also, *Claxton v. Lexington & Big Sandy R. R. Co.*, 13 Bush, 636, 17 Am. Ry. Rep. 12; *Maysville & Lexington R. R. Co. v. Herrick*, 13 Bush, 122, 17 Am. Ry. Rep. 53. And such wilful negligence may consist in using inferior machinery, or failing to use reasonable precautions to provide against accidents; or it must be shown that the conduct of the defendant indicated reckless indifference to the safety of the public, or an intentional failure to perform a plain and manifest duty, in the performance of which the public, or the party injured, has an interest. And the evidence of experts is admissible as to the quality and strength of materials used, and the safety of appliances: *Claxton v. L. & B. S. R. R. Co.*, *supra*. It is a question for the jury: *Ibid.* But see *Kansas Pacific Ry. Co. v. Cutter*, 19 Kans. 83, 17 Am. Ry. Rep. 474. In this case the only evidence of negligence submitted was that some of the ties at

criminal or wanton nature, else the amount sought to be recovered must be confined to compensation."<sup>1</sup>

In Ohio, however—but, as we conceive, contrary to the general ruling in other states—it is held that punitive damages are recoverable of a railroad company in all such cases as justify, in law, a like recovery against an individual or natural person; citing and following the ruling in *Hopkins v. The Atlantic & St. Lawrence Railroad Company*, 36 New Hampshire Reports, 9.<sup>2</sup>

Where there are joint defendants, the jury can not consider the pecuniary ability of one or more of them in aggravation of damages.<sup>3</sup>

When willful negligence on the part of the defendant is established, the question of contributory negligence can not arise. The defendant is liable absolutely, no matter how negligent the plaintiff may have been.<sup>4</sup>

**20. Excessive damages.**—It is impossible to lay down any test by which it can be indisputably determined, in all cases, whether damages awarded are excessive. To determine this question many conditions are to be considered. The age and previous physical condition of the injured party; the amount of suffering, physical and mental, caused by the injury; the probability or certainty that its effects will be permanent, or of long

and near the place of the accident were rotten, and it appearing that the company had a competent section boss, and that he was, as fast as he deemed it necessary, replacing the rotten ties with sound ones, it was held that no case for exemplary damages was made out.

<sup>1</sup>*City of Chicago v. Martin*, 49 Ill. 245; *Chi., Rock Isl'd & Pacific Ry. Co. v. Herring*, 57 Ill. 59. Improper language addressed to a mother by a conductor will not justify the assessment of exemplary damages in a suit by an infant child: *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Dewin*, 86 Ill. 296, 17 Am. Ry. Rep. 416.

<sup>2</sup>*Atlantic & Great Western Ry. Co. v. Dunn*, 19 Ohio St. 162; *Pittsburgh, Fort Wayne & Chicago R. R.*

*Co. v. Slusser*, 19 Ohio St. 157. And see, to the same effect, *Malecek v. Tower Grove & Lafayette Ry. Co.*, 57 Mo. 17, 9 Am. Ry. Rep. 1; *Hays v. Houston G. N. R. R. Co.*, 46 Tex. 272, 13 Am. Ry. Rep. 281; *Gasway v. Atlanta & West Point R. R. Co.*, 53 Ga. 216, 16 Am. Ry. Rep. 99; *Quigley v. Cent. Pac. R. R. Co.*, 11 Nev. 350; *Haley v. Mobile & Ohio R. R. Co.*, 7 Baxt. (Tenn.), 239.

<sup>3</sup>*Toledo, Wabash & Western Ry. Co. v. Smith*, 57 Ill. 517, 10 Am. Ry. Rep. 445; *Chicago City Ry. Co. v. Henry*, 62 Ill. 142, 6 Am. Ry. Rep. 365.

<sup>4</sup>*Claxton v. Lexington & Big Sandy R. R. Co.*, 13 Bush, 636, 17 Am. Ry. Rep. 12.

duration; the extent of disability; the time lost, or which probably will be lost, and the value thereof; and the expenses necessarily incurred by reason of the injury, are some of those conditions. Hence, within certain limits, this question must be determined in each case upon due consideration of all the evidence presented.

Still, it may safely be laid down as a general rule, in cases of this kind, that when the testimony warrants the jury in finding that the injury will produce serious and permanent disability—that it will incapacitate the injured party for labor or the pursuit of his business during the remainder of his life—the courts will very seldom disturb the award of damages.<sup>1</sup> But verdicts are not to be set aside as excessive merely because the court would be better satisfied if the damages were assessed at a less sum, but only when it is clear they are materially greater than the evidence will justify.<sup>2</sup> And the fact that on a former trial of the same case the same damages were awarded, is of no moment, especially if, on the former trial, the jury were allowed to give exemplary damages, while in the subsequent trial damages were limited, by instruction, to compensation.<sup>3</sup>

Circuit courts in Wisconsin have the power, and it is their duty, to set aside verdicts awarding excessive damages.<sup>4</sup>

For putting one off a sleeping-car, without violence or wrong motive, who could not produce a ticket, having lost the same, but not, however, until shown to the porter of the car, was held to render the company liable; but a verdict of three thousand dollars damages therefor was declared to be greatly excessive, the passenger having suffered no personal indignity, nor received any actual injury therefrom, or in putting him off, except the inconvenience incurred.<sup>5</sup>

<sup>1</sup> *Duffy v. Chicago & Northwestern Ry. Co.*, 34 Wis. 188, 8 Am. Ry. Rep. 1. Where the damages are reduced, by *remittitur*, to an amount satisfactory to the trial judge, the appellate tribunal will not interfere: *Loyd v. Hannibal & St. Joseph R. R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474.

<sup>2</sup> *Bass v. Chicago & Northwestern Ry. Co.*, 39 Wis. 636, 13 Am. Ry. Rep. 414.

<sup>3</sup> *Bass v. C. & N.W. Ry. Co.*, *supra*.

But see *Union Pacific Ry. Co. v. Young*, 19 Kans. 488, 19 Am. Ry. Rep. 52.

<sup>4</sup> *Bass v. Chicago & Northwestern Ry. Co.*, 39 Wis. 636, 13 Am. Ry. Rep. 414. In New York it is a matter entirely within the discretion of the General Term, and the exercise of such discretion is not reviewable by the Court of Appeals: *Peck v. N. Y. Cent. & H. R. R. R. Co.*, 70 N. Y. 587, 19 Am. Ry. Rep. 1.

<sup>5</sup> *Pullman Palace Car Co. v. Reed*,

In a case of insulting demeanor and conduct by defendant's conductor to a female passenger, in which the injury consisted in mental suffering and distress, one thousand dollars was held not excessive.<sup>1</sup>

And so for an injury to the person, involving the loss of a hand, there being no elements in the case calling for punitive damages, and the injury not having been accompanied with severe or protracted sickness or suffering, it was held that a verdict for ten thousand dollars was so excessively unjust as to shock the sense of right, and a new trial was awarded.<sup>2</sup>

And so if the allegation of plaintiff be of a servant's incompetency, and that the company knew thereof, it is not sustained by evidence that the servant was incompetent, and was employed without proper inquiry being made thereof. Though the latter be a cause of action, yet in the particular case the allegations and proof must correspond.<sup>3</sup>

And so in an action for a personal injury, involving a mere sprain and the loss of two weeks time on a salary of eighteen hundred dollars per annum, where there is no gross negligence or wrong intention shown against the defendant, a verdict of two thousand five hundred dollars is excessive, and will be set aside.<sup>4</sup>

75 Ill. 125. But a verdict for five hundred dollars, in a somewhat similar case, held not excessive: *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Henrich*, 39 Ind. 509, 10 Am. Ry. Rep. 414. Seven hundred and fifty dollars held excessive, in *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Dewin*, 86 Ill. 296, 17 Am. Ry. Rep. 416. And also one thousand dollars: *Goins v. Western R. R. Co.*, 59 Ga. 426, 18 Am. Ry. Rep. 107. And in *Bass v. C. & N. W. Ry. Co.*, *supra*, a verdict for four thousand five hundred dollars in a case of expulsion, with slight injury and under degrading circumstances, where, by instruction, the damages were limited to compensation, was held excessive. But a subsequent verdict of two thousand five hundred dollars in the same case, was held not excessive: 42 Wis. 654, 15 Am. Ry. Rep. 45.

<sup>1</sup> *Craker v. Chicago & Northwestern*

*Ry. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118.

<sup>2</sup> *Union Pacific Ry. Co. v. Milliken*, 8 Kansas, 647, 657. But see *Same v. Young*, 19 *Id.* 488, 19 Am. Ry. Rep. 52, where, in a substantially similar case, a verdict for ten thousand dollars was allowed to stand. And in a case of internal injury, not of a nature to impair the ability of plaintiff to earn a livelihood, twelve thousand dollars was held excessive: *Chicago City Ry. Co. v. Henry*, 62 Ill. 142, 6 Am. Ry. Rep. 365. For a broken leg, five thousand dollars is not excessive: *Maysville & Lexington R. R. Co. v. Herick*, 13 Bush, 122, 17 Am. Ry. Rep. 53.

<sup>3</sup> *Union Pacific Ry. Co. v. Young*, 8 Kansas, 658.

<sup>4</sup> *Spicer v. The Chicago & Northwestern Ry. Co.*, 29 Wis. 580.



In a case where the plaintiff was so injured as to become a cripple for life, and had suffered much pain and anguish, and expended a large sum of money, but no evidence of willfulness or wantonness appeared, twenty-five thousand dollars was held to be grossly excessive.<sup>1</sup> And where the plaintiff was thirty years of age, engaged in an employment having a regular system of promotions, and earning five hundred and forty dollars a year, and was permanently disabled, a verdict of eleven thousand dollars was held not excessive.<sup>2</sup>

Where no bones are broken, and there are but slight bruises or other injuries, and little, if any, negligence on the part of the railroad company is shown, five thousand dollars damages are so excessive that judgment will not be allowed to stand therefor, but will be reversed, and a new trial awarded.<sup>3</sup>

Where, in an action for a personal injury causing death, it appeared the deceased was twenty-four years of age, without family, of temperate and industrious habits, and his annual net earnings were two hundred and sixty-three dollars, a verdict of ten thousand dollars was held excessive.<sup>4</sup> But in a case where the deceased was sixty years of age, in reasonable health, and of industrious habits, four thousand five hundred dollars was held not excessive.<sup>5</sup>

In Kentucky it is held that "excessive damages, appearing to have been given under the influence of passion or prejudice," is ground for reversal of an order overruling a motion for a new trial on that ground, under their Civil Code, sub-section 4 of Section 369.<sup>6</sup> And in that case, where plaintiff claimed one hundred and fifty thousand dollars damages for serious and perma-

<sup>1</sup>Chicago & Northwestern Ry. Co. v. Fillmore, 57 Ill. 265, 10 Am. Ry. Rep. 462.

<sup>2</sup>Belair v. Chicago & N. W. R. R. Co., 43 Ia. 662, 14 Am. Ry. Rep. 575. And so of twenty-eight hundred dollars: Stetler v. Chi. & N. W. Ry. Co., 49 Wis. 609; S. C. 6 N. W. Repr. 303, 21 Am. Ry. Rep. 89. And see Illinois Cent. R. R. Co. v. Parks, 88 Ill. 373, 21 Am. Ry. Rep. 313.

<sup>3</sup>Chicago, R. I. & P. R. R. Co. v. McKittrick, 78 Ill. 619. And see Same v. Payzant, 87 Id. 125; S. C. 18 Am.

Ry. Rep. 200.

<sup>4</sup>Rose v. Des Moines Valley Ry. Co., 39 Ia. 246, 9 Am. Ry. Rep. 7.

<sup>5</sup>Walter v. C., D. & M. R. R. Co., 39 Ia. 33, 9 Am. Ry. Rep. 78. And in Jeffersonville, Madison & Indianapolis R. R. Co. v. Riley, 39 Ind. 568, 10 Am. Ry. Rep. 325, two thousand three hundred and thirty-three dollars and thirty-five cents held not excessive.

<sup>6</sup>Louisville & Nashville R. R. Co. v. Fox, 11 Bush, 495, 14 Am. Ry. Rep. 374.

ment injuries, disabling him for life, including five thousand dollars for expenses of cure, and five hundred dollars for baggage lost, and the plaintiff claimed only compensatory damages, thirty-five thousand five hundred dollars was considered excessive, and the judgment reversed for that reason.<sup>1</sup>

**21. Damnum absque injuria.**—It is a well settled and familiar principle of the law that the doing of a lawful act, if done in a proper manner, and by one authorized to do it, is no ground of action against him at the suit of another, although the result of it be a loss to the latter. It is *damnum absque injuria* to such other, and will not support an action. To enable a party whose interests are affected by the act of another to maintain an action for a loss suffered by reason of such act, the act itself, as against the party affected thereby, must be wrong; and being so, must also violate some right of the latter.<sup>2</sup> Thus, an act done by a railroad corporation under authority of law, can not be complained of as a ground of action by a person affected indirectly thereby as a riparian owner, none of his own property or rights being directly infringed. It is *damnum absque injuria*.<sup>3</sup>

There is a clear distinction in law betwixt injuries incurred by a landholder, adjacent to the railroad, from injurious acts of the company which the law makes it their duty to avoid, and indirect losses or annoyances of such landholder, incurred by him by reason of his placing himself or property in close proximity to the road after it is erected.<sup>4</sup> Thus, where one builds his residence near to the line of a railroad, after the right of way is obtained and the road is constructed and in operation, and with

<sup>1</sup> *Ibid.* For other cases where the court has refused to disturb the verdict, see *Hanson v. European & N. Am. Ry. Co.*, 62 Me. 84; *Cox v. N. Y. Cent. & H. R. R. Co.*, 4 Hun, 176; *Peck v. Same*, *Id.* 236; *Berg v. Chicago, Milw. & St. P. Ry. Co.*, 50 Wis. 419, 7 N.W. Repr. 347; *Houston & Great Northern R. R. Co. v. Randall*, 50 Tex. 254; *Lambkin v. South Eastern Ry. Co.*, L. R. 5 App. Cas. 352; *Phillips v. London & S.W. Ry. Co.*, L. R. 4 Q. B. Div. 406; S. C. 5 *Id.* 78, and L. R. 5 C. P. Div. 280. In the latter case it was held that the court will

grant a new trial for inadequacy of the verdict, where it appears that the jury have omitted to consider an element of damage proven in the case.

<sup>2</sup> *Hoe v. Alexandria*, 1 Cranch C. C. R., 98; *Fitchburg R. R. Co. v. The Boston & Maine R. R. Co.*, 3 Cush. 58; *Porter v. North Missouri Railroad Company*, 33 Mo. 128.

<sup>3</sup> *Fitchburg R. R. Co. v. The Boston & Maine R. R. Co.*, 3 Cush. 58.

<sup>4</sup> *Indianapolis, Bloomington & Western Ry. Co. v. McLaughlin*, 77 Ill. 275.

full knowledge that the same is likely to be affected by noise, smoke and other inconveniences, resulting from a proper use of the road, he will not be entitled to recover against the railroad company for any such annoyances or inconveniences.<sup>1</sup>

<sup>1</sup>Indianapolis, Bloomington & Western Ry. Co. v. McLaughlin, 77 Ill. 275. In such case no wrong act is done by the railroad company, and no

right of the other party is violated. The case is purely *damnum absque injuria*.

## CHAPTER XLI.

### SALES OF RAILROADS BY ORDINARY BARGAIN AND SALE.

	Section.		Section.
A railroad company may sell its road . . . . .	1	but not to make thereby a benefit to stockholders or officers of the company . . . . .	5
The purchasers take subject to legal burdens and the original user . . . . .	2	May not sell it in parcels, or with a view to its discontinuance . .	6
The purchase does not carry with it the corporate franchise . .	3	Ratification of objectionable sale	7
Nor does the sale work a dissolution of the corporation . .	4	Sale of corporate franchise by statutory permission . . .	8
May sell to pay mortgage lien,		Sale under trust deed or power .	9

**1. A railroad company may sell its road.**—A railroad corporation may upon general principles, and therefore may of course where its charter or articles of association expressly permit it, sell and transfer its entire road and estate to another company, whenever in the opinion of its directors such sale will facilitate the completion of the road, or conduce to the interests of the company;<sup>1</sup> but not its franchise to be a corporation. The latter is not a subject of sale or transfer, unless the positive law permit the same, and point out the manner in which it is to be effected.<sup>2</sup>

<sup>1</sup> *Mahaska Co. R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Iowa, 437; *Jones v. Guaranty & I. Co.*, 101 U.S. 622; *West v. Madison Co. Agr. Bd.*, 82 Ill. 205. A sale of one railroad to another, made upon condition that it is not to take effect until ratified by the stockholders of both companies, will be set aside if the notice required by the charter of the vendor railroad of a meeting of the stockholders for that purpose is not given: *Stockholders of Shelby R. R. Co. v. Louisville, Cincinnati & Lexington R. R. Co.*, 12 Bush,

62, 18 Am. Ry. Rep. 213. But no sale can be made under the laws of Nebraska until the construction of the road: *Clarke v. Omaha & South Western R. Co.*, 4 Brown, 458, 19 Am. Ry. Rep. 423. Such sale may be of all its property at once, as well as by parcels: *Buford v. Keokuk N. Line Packet Co.*, 3 Mo. App. 159; *Featherstonhaugh v. Lee Moor Porcelain Clay Co.*, L. R. 1 Eq. Cas. 318.

<sup>2</sup> *Pierce v. Emery*, 32 N. H. 484; *Thomas v. West Jersey R. R. Co.*, 101 U. S. 71; *State v. Consolidation Coal*

**2. The purchasers take subject to legal burdens and the original user.**—The purchaser or purchasers thereof will not only take the same, as in cases of private sales of other property, subject to all legal burdens and liens, but also subject to the same public servitude and user which were contemplated by the original organization, and attached to it in the hands of the original owners. This, too, although by reason of such sale the original project be varied or defeated as to the matter of locality of route or terminus;<sup>1</sup> for these changes were subject to be made at discretion by the original promoters of the scheme.<sup>2</sup> But the sale of a railroad, or portion thereof, by a railroad company, does not impose upon the purchaser the payment of, or liability for, the debts of the company making the sale, where such debts are in no manner a lien upon the property sold.<sup>3</sup> So, if several roads be consolidated, and the consolidated company thereby become liable for the debts of all the companies thus consolidated, and thereafter sell a portion of one of the consolidated roads, the purchaser is not thereby made liable for the debts of the consolidated company, or of any part thereof, nor is the part sold liable in his hands, if there be no specific lien thereon, to secure the payment of such debts.<sup>4</sup>

**3. The purchase does not carry with it the corporate franchise.**—The voluntary sale of a railroad by the corporate owners thereof will not carry with it the corporate capacity, character and franchise of the company selling, except such as flow from the ownership of the property itself, as the right to operate the road and receive the tolls and profit thereof. It does not carry the right to the corporate name of the company selling, so as to vest it in the party purchasing; nor does it impart to the pur-

Co., 46 Md. 1; *Mulliner v. Midland Ry. Co.*, Law Rep. 11 Ch. Div. 611. But see *Hall v. Sullivan R. R. Co.*, 21 Law Repr. 138; *State v. Richmond & Danville R. R. Co.*, 72 N. Car. 634.

<sup>1</sup> *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Iowa, 437.

<sup>2</sup> *Gear v. Dubuque & Sioux City R. R. Co.*, 20 Iowa, 523; *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Iowa, 437; *Miss. & Tenn. R. R. Co. v. Devaney*, 42 Miss. 555;

S. C. 2 Am. R. 608.

<sup>3</sup> *Wright v. Mil. & St. Paul Ry. Co.*, 25 Wis. 46.

<sup>4</sup> *Wright v. Mil. & St. Paul Ry. Co.*, 25 Wis. 46. And the purchaser of a mortgaged road can not be required to carry out a perpetual contract, made by the mortgagor before executing the mortgage, guaranteeing that the tolls of a bridge shall amount to a certain sum: *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush, 673, 18 Am. Ry. Rep. 221.

chasers corporate capacity or character. If such purchasers desire to operate in a corporate capacity, they must perfect a corporation of their own.<sup>1</sup>

**4. Nor does such sale work a dissolution of the corporation.**—The sale of the line of its road and appliances by a railroad corporation, whether finished or unfinished, does not work a dissolution, or terminate the corporate existence, of such corporation. Its corporate character still remains, with its functions unimpaired, and may be exercised in such other similar enterprise, within the purposes and objects originally designed by the organization, as the company may deem advisable; and so a sale of a portion of a line will not prevent the corporation so selling from going on and completing other contemplated portions of the line, or work originally intended as a part thereof.<sup>2</sup>

**5. May sell to pay mortgage lien, but not to make benefit thereby to stockholders or officers of the company.**—The assets of an insolvent railroad company are a trust fund for the payment of its corporate debts;<sup>3</sup> and though the stockholders and corporate body may sell out the entirety thereof in payment of mortgage liens, and the sale will be binding if carried into effect, yet they can not, in such sale, by an arrangement with the mortgage creditors, appropriate to the individual benefit of the stockholders a percentage or portion of the amount due the mortgagees, although the mortgagors accept the residue in full discharge of their lien. When the lien is thus discharged, then the percentage received by the stockholders becomes liable for the other debts of the company, and the ordinary creditors may pursue it in the hands of the stockholders, and hold them liable therefor. Individually, the stockholders can take no benefit from the cor-

<sup>1</sup> *Pierce v. Emery*, 32 N. H. 484; *Clarke v. Omaha & South Western R. R. Co.*, 4 Brown (Neb.), 458, 19 Am. Ry. Rep. 423; *ante*, subdn. 1.

<sup>2</sup> *Mahaska County R. R. Co. v. Des Moines Valley R. R. Co.*, 28 Iowa, 437; *U. S. v. Little Miami, C. & X. R. R. Co.*, 9 Repr. 676 (U. S. Cir. Ct. S. Dist. Ohio, Mar., 1880); *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353; *State v. Rives*, 5 Iredell's Law (N.C.), 297; *Comm. v. Cent. Pass. Ry. Co.*, 52 Penn. St. 506; *Comm. v. Tenth Mass.*

*Turnp. Co.*, 5 Cush. 509. Where a statute provides that a corporation shall be dissolved by a mortgage sale of the franchises and property, an illegal and fraudulent sale does not work a dissolution: *White Mountains R. R. Co. v. White Mountains (N. H.) R. R. Co.*, 50 N. H. 50.

<sup>3</sup> *Chicago, Rock Island & Pacific R. R. Co. v. Howard and others*, 7 Wall. 392; *Winans v. The McKean Railroad & Navigation Co.*, 6 Blatch. 215; *S. C. 1 Withrow's Corp. Cas.* 103.

porate assets until the corporate debts are paid. And if, in such case, their reserved percentage be paid to them in certificates of stock in the company created by the purchaser, or company which becomes the purchaser, such certificates of stock are not negotiable to such extent as to prevent the stock represented by them from being subjected in equity to the payment of the debts of the corporation, even if they be in the hands of innocent holders. For though they be assignable, or payable to bearer, the assignees or holders thereof take them subject to every equity to which they were liable in the hands of the original owners. They are not negotiable instruments within the ordinary legal import of the term, so as to carry with them, when transferred, exemption from such equity.<sup>1</sup>

**6. May not sell it in parcels, or with a view to its discontinuance.**—A railroad corporation authorized by law to lease, rent or sell its road, appurtenances and franchise to any other incorporated railroad company, may not sell its road to unincorporated persons, and in parcels, with a view to its discontinuance as a road, but will be restrained from so doing, on application, by bill in equity, of such of the stockholders as oppose the same, they being in a minority, and therefore unable to prevent the sale by other means. Such sale will be inhibited, not only from due regard to the original rights of the opposing stockholders, but also in reference to the interest of the public, although the state be not a party to the bill, as the sale would violate the object and terms of the charter.<sup>2</sup>

**7. Ratification of objectionable sale.**—A sale of a railroad, made by its agents, to another corporation of which one of these agents was at the time the president, acting for such corporate purchaser, is invalid, upon the principle that a person can not, in the same transaction, both buy and sell, or act both for the buyer and seller.<sup>3</sup> But if such sale thereafter, with all the circumstances, come to the knowledge of the directory of the company selling the road, and in their session be discussed and un-

<sup>1</sup> Chicago, Rock Island & Pacific R. R. Co. v. Howard and others, 7 Wall. 392.

<sup>2</sup> The Upson County R. R. Company and others v. Sharman and others, 37

Geo. 644; S. C. 1 Withrow's Corp. Cas. 322.

<sup>3</sup> Walworth County Bank v. Farmers' Loan & Trust Co., 16 Wis. 629.

derstood, and no disapprobation be expressed, the sale will thereby be ratified, except as against creditors.<sup>1</sup>

**8. Sale of corporate franchise by statutory permission.**—A corporation aggregate may, when authorized by a statute of the state creating it (if such statute be valid and constitutional), sell, transfer and convey its charter and franchise to be a corporation, and thereby vest the same in the purchaser or purchasers.<sup>2</sup> But the reality of the transaction in all such cases is, in legal effect, no more nor less, and nothing other, than a surrender or abandonment of the old charter to the state by the corporators, and a grant *de novo* by the state of a similar one to the purchasers or transferees, whether under a general law, already enacted, allowing the same to all corporations, or by a special statute, where special legislation is allowable for the creation of corporations. It is merely the purchase of the privilege of being subrogated to, and recognized by, the state as the corporate entity, in lieu of the original corporators; and the terms of the old charter become those of the new, by legal enactment, without a repetition of the words.<sup>3</sup> The transfer is the effect, or act, of the law, given by the expressed consent of the grantors, of which consent the deed of sale is the evidence.<sup>4</sup> Such, say the Supreme Court of Ohio, “is the view entertained wherever the courts have spoken directly of the legal effect of such conveyances,” provided what is done be constitutionally and effectually done. There must be constitutional power, not only to receive back the old charter, but to confer the new one; and if it be under a general law, such general law and the action under it must conform to the constitution, else the corporate entity will not pass, so as to confer the character of a domestic corporation upon the purchasers.<sup>5</sup>

But a foreign corporation may purchase and hold real estate when not prohibited by legislation or the general policy of the law of the state wherein such real estate is situated;<sup>6</sup> and the

<sup>1</sup> Walworth County Bank v. Farmers' Loan & Trust Co., 16 Wis. 629.

<sup>2</sup> State of Ohio, *ex rel.* Atty. Genl., v. Sherman and others, 22 Ohio St. 411.

<sup>3</sup> State, *ex rel.* Atty. Genl., v. Sherman and others, 22 Ohio St. 411.

<sup>4</sup> State *ex rel.* Atty. Genl., v. Sherman and others, 22 Ohio St. 411.

<sup>5</sup> The State, *ex rel.* Atty. Genl., v. Sherman and others, 22 Ohio St. 411; Atkinson and others v. The Marietta & Cincinnati R. R. Co. (as reorganized), 15 Ohio St. 21.

<sup>6</sup> The State, *ex rel.* Atty. Genl., v. Sherman and others, 22 Ohio St. 411, 434; American Bible Society and oth-



ownership thus permitted implies use thereof, and the nature of the use is determined by the nature of the property itself.<sup>1</sup> In Ohio there is not only no prohibitory law or state policy against such privilege, but the policy of the law, and the law itself, encourages such ownership and use, by placing foreign corporations, in this respect, on an equal footing with domestic ones.<sup>2</sup> So that when such foreign corporations have power, where they are created and reside, to take lands by the right of eminent domain, they may do the same in Ohio, by virtue of the act of April 11, 1861, which provides that corporations of other states possessing railroads which are partly in Ohio, may exercise and enjoy in the latter state all their powers, privileges, faculties and franchises, for the purposes of such railroads and the business thereof, not inconsistent with the laws of the state and the provisions of that act.<sup>3</sup>

In the absence of statutory authority to the contrary, a corporation can not sell its corporate franchise, or right to be a corporation; nor can it be sold by forced sale under execution, or by judicial sale in the foreclosure of a mortgage (unless by statute allowed to be mortgaged): and therefore a purchase at such judicial sale will not carry with it the corporate capacity, or right in law to be a corporation, and the purchaser or purchasers will not, by such purchase, become clothed with any sort of corporate capacity.<sup>4</sup> And so, where private corporations may not be created by special enactment, by reason of constitutional inhibitions, then a special act of assembly designed and purporting to confer corporate capacity on the purchaser at such a sale, is void for unconstitutionality, and no corporate capacity will vest in the purchaser or purchasers by the sale.<sup>5</sup>

**9. Sale under trust deed, or power.**—If the trustee in a trust deed of a railroad becomes incapable of acting, the court may appoint another.<sup>6</sup> If such trustee and the president and direct-

ers *v. Marshall and others*, 15 Ohio St. 537.

<sup>1</sup> *The State, ex rel. Atty. Genl., v. Sherman and others*, 22 Ohio St. 411, 433, 434.

<sup>2</sup> *The State, ex rel. Atty. Genl., v. Sherman and others*, 22 Ohio St. 411, 434.

<sup>3</sup> *The State, ex rel. Atty. Genl., v.*

*Sherman and others*, 22 Ohio St. 411, 434.

<sup>4</sup> *Atkinson and others v. The Marietta & Cincinnati R. R. Co. (as reorganized)*, 15 Ohio St. 21.

<sup>5</sup> *Atkinson and others v. The Marietta & Cincinnati R. R. Co. (as reorganized)*, 15 Ohio St. 21.

<sup>6</sup> *Wash., Alex. & Georgetown R. R.*

ors of the company seek the cover of, and remain in, the enemy's country in time of war, they thereby incapacitate themselves to act as such, and the court will appoint others in their place; but there must be publication of notice of the proceeding to appoint; and if no notice be given, and the trustee or trustees so appointed make a sale of the road, the sale is void, for that the order of his appointment being made without notice, is void. The parties in interest must have their day in court to render the proceeding valid.<sup>1</sup>

To pass choses in action and other legal instruments or covenants by the foreclosure sale of a railroad under a power contained in a mortgage, it is essential that a notice and description thereof be given in the notice of sale. Notwithstanding the mortgage may embrace them, yet, if there be no notice of the sale thereof, they will not pass by the sale. A sale at auction upon notice implies that in the notice there shall be some designation of that which is to be sold, so that the bidders may know where and what is the property which they are about to buy.<sup>2</sup>

Co. v. Alex. & Wash. R. R. Co., 19  
Gratt. 592.

<sup>1</sup> *Ibid.*

<sup>2</sup> Milw. & Minn. R. R. Co. v. The  
Mil. & Western R. R. Co., 20 Wis.  
174.

## CHAPTER XLII.

### BANKRUPTCY AND INSOLVENCY.

	Section.		Section.
Railroad corporations are within the provisions of the bankrupt act . . . . .	1	Forfeiture of contractor's contract valid against his assignee	4
But not within the clause in relation to non-payment of commercial paper . . . . .	2	Domestic railroad corporations are subject to state insolvent laws	5
Nor will a mere executory agreement to violate the law subject the company to bankruptcy . . . . .	3	Consolidation with foreign corporation . . . . .	6
		Stockholders of insolvent company liable for unpaid stock . . . . .	7

**1. Railroad corporations are within the operation of the bankrupt act.**—Railroad corporations come within the general scope of the United States bankrupt laws. They are within the meaning of the term “business or commercial corporations,” as used in the act of Congress. In the language of DILLON, Justice, “Railways fall within the designation of business or commercial corporations. Domestic or inter-state commerce, as well as foreign commerce, is contemplated by the constitution, and is habitually carried on by land as well as by water. Indeed, since the general introduction of railways, it is a fact known to all that navigation by river has relatively become of secondary importance, and the inland commerce and travel of the country are largely conducted and carried on by means of railways.”<sup>1</sup>

**2. But not within the clause in relation to non-payment of commercial paper.**—But although railroad companies are within the scope of the United States bankrupt laws in other respects, they are not within that clause which relates to the suspension or non-payment, for a given number of days, of commercial paper. That clause of the law is confined to “bankers, brokers, merchants, traders, manufacturers and miners”; railroad corporations do not come within either of these designations. Nor

<sup>1</sup> Winter v. Iowa, Minn. & North Pacific Ry. Co., 2 Dillon's C. C. R.,

does it matter that the paper which they fail to pay may be in its character commercial paper; to bring the case within that provision of the law, the failure must be by one or the other of the institutions or persons included in the above description, as specified in said act of Congress.<sup>1</sup>

**3. Nor will a mere executory agreement to violate the law, subject the company to bankruptcy.**—To commit an act of bankruptcy, it is necessary that the thing inhibited should be actually done. The act must be committed, not merely contemplated, or even agreed to be done. Therefore, as is holden by DILLON, Justice, the mere agreement of a railroad company, in contemplation of insolvency, to issue or to transfer to another certificates of its stock, in any amount whatever, with intent to give a preference, and to defeat and delay the operation of the act, will not subject the company to be proceeded against for bankruptcy.<sup>2</sup> As to the actual effect of the transaction if the agreement were fully executed, the court declined to decide, the question not being fully raised by the pleadings.

**4. Forfeiture of contractor's contract valid against his assignee.**—The usual provision of construction contracts for the termination of the contract and forfeiture of the reserved percentage, holds good against the claim of the assignee in bankruptcy to the assets of a bankrupt contractor to whom he is assignee. The contract being valid, as such are held to be, the power of the engineer is sufficient to declare the termination and forfeiture; and his action, if not fraudulent, binds not only the contractor, but also the assignee appointed by the court in bankruptcy. The amount so forfeited is regarded as liquidated damages, and not as a penalty.<sup>3</sup>

In this case (*Geiger et al. v. The Western Maryland R. R. Co.*), the court declare the rule of law to be, that where the parties clearly agree for a forfeiture of a sum certain, or certainly ascertainable, by way of compensation for the breach or non-performance of a contract, the resulting damages for which breach would be uncertain, and incapable of judicial ascertainment by any fixed standard, and the forfeiture is referred to as liquidated

<sup>1</sup> *Winter v. Iowa, Minn. & North Pacific Ry. Co.*, 2 Dillon's C. C. Reps., 487.

*Pacific Ry. Co.*, 2 Dillon's C. C. R., 487.

<sup>3</sup> *Geiger and others v. The Western Maryland R. R. Co.*, 41 Md. 4.

<sup>2</sup> *Winter v. Iowa, Minn. & North*

damages, it is to be so considered and enforced, and is not to be treated as a mere penalty.<sup>1</sup>

**5. Domestic railroad corporations are subject to state insolvent laws.**—Domestic corporations, including as well railroad corporations as others, are subject to, and may be proceeded against under, the insolvent laws of the states wherein they are respectively incorporated.<sup>2</sup>

Where a claim is passed on and allowed by the court against a corporation which is in the hands of a liquidator, the matter becomes *res judicata*, and payment thereof may not be resisted on grounds that might have been pleaded or shown against the adjudication in the proceeding in which the judgment was rendered. There is no going behind such adjudication upon facts or circumstances which might have defeated the claim if presented at the proper time. It is too late for their consideration after the claim has been passed on.<sup>3</sup>

**6. Consolidation with foreign corporations.**—The fact of a domestic corporation having become a member of another corporation composed of itself and of two other corporations, each of two other different states, will not absolve either of such original corporations from liability to the insolvent laws of their respective states, nor from proceedings against them severally under those laws.<sup>4</sup>

In the prosecution of such proceedings against either of such corporations in the state wherein, by law, they are originally incorporate, the original place of business of the defendant corporation in said state, in case it has kept up no distinct place of business, will be regarded as such, and by intendment of law will be such; and so will its former officers, for purposes of service and place of suit, be regarded as the officers of the company;

<sup>1</sup> See, also, *Ranger v. Great Western Ry. Co. et al.*, 5 House of Lords' Cases, 72; *Reilly v. Jones*, 1 Bing. 302; *Saintier v. Ferguson*, 7 C. B. 716; *Fletcher v. Dyche*, 2 T. R. 32; *Beale v. Hayes*, 5 Sandford, 640; *Bagley v. Peddie*, 5 Sandford, 192; *Smith v. Smith*, 4 Wend. 468; *Knapp v. Maltby*, 13 Wend. 587; and 1 Am. R. W. Cases, note, p. 107, cited by the court in *Geiger et al. v. The Western Mary-*

*land R. R. Co.*, *supra*.

<sup>2</sup> *Platt v. New York & Boston R. R. Co.*, 26 Conn. 544; *Cent. Nat. Bank of Worcester v. The Worcester Horse R. R. Co.*, 13 Allen (Mass.), 105.

<sup>3</sup> *State of Louisiana v. Clinton & Port Hudson R. R. Co.*, 21 La. An. 156.

<sup>4</sup> *Platt v. New York & Boston R. R. Co.*, 26 Conn. 544.

and neither said original place of business nor officers can be so discontinued or abolished as to prevent service thereat and thereon, if no other place be fixed or other officers be chosen within such state, by said original corporation, as its own.<sup>1</sup>

**7. Stockholders in insolvent company liable for unpaid stock.**—When a railroad corporation becomes insolvent, and its other assets are insufficient to meet its debts, the creditors thereof may, upon a proper case made, showing such insolvency and insufficiency of other means, maintain proceedings against a stockholder or stockholders for the amount of any unpaid balance due the corporation from them for their capital stock; and when obtained, the amount will be applied upon the corporate debt of the creditor or creditors thus recovering the same.<sup>2</sup>

<sup>1</sup> *Platt v. New York & Boston R. R. Co.*, 26 Conn. 544.

<sup>2</sup> *Morgan v. The New York & Albany R. R. Co.*, 10 Paige Ch. Reps. 290.

## CHAPTER XLIII.

### RECEIVERS.

	Section.		Section.
Appointment, rights, powers and character of receivers . . .	1	Jurisdiction as between federal and state courts . . .	4
Suits against receivers . . .	2	Receiver's rights may be protected by an injunction . . .	5
Execution levy of property in the hands of receiver . . .	3		

#### 1. Appointment, rights, powers and character of receivers.—

The appointment of a receiver is a matter of equity jurisdiction, and as such is to a great extent subject to the discretion of the court.<sup>1</sup> Such an appointment ought not to be made except where it is necessary to protect stockholders or creditors from loss, or to prevent an abuse of corporate franchises;<sup>2</sup> and the regular officers should not be displaced pending litigation, merely because of the insolvency of the corporation.<sup>3</sup>

<sup>1</sup> *Mil. & Minn. R. R. Co. v. Soutter*, 2 Wall. 440; *Cincinnati, Sandusky & Cleveland R. R. Co. v. Sloan*, 31 Ohio St. 1, 15 Am. Ry. Rep. 376; *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467; *Kelly v. Trustees of Ala. & Cin. R. R. Co.*, 58 *Id.* 489, 21 Am. Ry. Rep. 138. The Supreme Court of Wisconsin has no power, in rendering a judgment of dissolution against a railway company, to appoint a receiver, or make distribution among the creditors. Upon such a judgment, a disposition of the effects should be made as provided by the Wisconsin statute (Rev. Stat. ch. 78, secs. 8 and 9) in case of voluntary dissolution: *State v. West Wisconsin Ry. Co.*, 34 Wis. 197, 6 Am. Ry. Rep. 242. And see *Pacific R. R. v. Mo. Pacific Ry. Co.*, 15 Am. Ry. Rep. 80 (U. S. Supr. Ct., Oct. Term, 1877), as to the appointment of

a receiver pending an appeal.

<sup>2</sup> *City of Rochester v. Bronson*, 41 How. Pr. 78; *Meyer v. Johnston*, *supra*. An order vacating the appointment of a receiver is reviewable by the Supreme Court of Ohio, under sec. 572 of the code: *Cincinnati, Sandusky & Cleveland R. R. Co. v. Sloan*, 31 Ohio St. 1, 15 Am. Ry. Rep. 376.

<sup>3</sup> *Meyer v. Johnston*, *supra*. It might sometimes be more expedient to simply require the earnings of the road to be paid over to, and disbursed by, a *quasi* receiver, and to prevent interference by others with the management by injunction, in the meantime: *Ibid.* Consolidated corporations are subject, as to their property within each state, to the jurisdiction of their courts in the appointment of receivers: *Ellis v. Boston, H. & E. R. R. Co.*, 107 Mass. 1; *In re U. S. Rolling Stock*

The rights, powers and jurisdiction of the receiver, of a direct nature, emanate by express authority from the court making the appointment, and are enumerated and set forth in the order or decree by which the appointment is preferred;<sup>1</sup> and so is described therein the subject-matter of the receivership or trust.<sup>2</sup> And as all these are under the supervision and control of the court, it may from time to time, in its discretion, enlarge, circumscribe and vary the same, by judicial order, and upon satisfactory cause shown.<sup>3</sup>

To the powers directly given by his appointment, certain others incidentally occurring may be mentioned as necessary to the complete exercise of those directly given: such, for instance, as the power to bring and prosecute suits, give acquittances, and other acts necessary to the proper discharge of the duties expressly imposed upon him, and which may be more or less varied in their nature, according to the character of the trust, and the general duties to be performed;<sup>4</sup> but in all

Co., 55 How. Pr. 286, 57 *Id.* 16; Taylor v. Atlantic & Great Western Ry. Co., 55 How. Pr. 275, 57 *Id.* 9; Richardson v. Vt. & Mass. R. R. Co., 44 Vt. 613. And so circuit courts of the United States may appoint receivers to control lines extending outside of their circuit, and of the state: Wilmer v. Atlanta & Richmond A. L. Ry. Co., 2 Woods, 409.

<sup>1</sup> Kennedy & Co. v. St. Paul & Pacif. R. R. Co. *et als.*, 2 Dill. C. C. R., 448. It is said in Meyer v. Johnston, *supra*, that the whole power of a court over a railroad in the hands of its receiver is confined to making necessary repairs and protecting the property; and the court may continue the running of trains and the usual business of the road, and where the income is insufficient; may provide means therefor by creating charges on the property; and see same case, *post*. Any acts necessary for the preservation or protection of the property, or the enhancement of its value, may be authorized by the court: Gibert v. Washington City,

Va. Midland & Great Southern R. R. Co., 33 Gratt. 586; S. C. 1 Am. & Eng. R. R. Cas. 473. The court acts as well for the interests of the company as for the creditors. It will therefore authorize the receiver to take a lease of another road, and to contribute, out of the accrued revenues in his hands, to the building of another road: *Ibid*.

<sup>2</sup> Kennedy & Co. v. St. Paul & Pacific R. R. Co. *et al.*, 2 Dill. C. C. R., 448.

<sup>3</sup> Kennedy & Co. v. St. Paul & Pacif. R. R. Co. *et al.*, 2 Dill. C. C. R., 448.

<sup>4</sup> Rankine v. Elliott, 16 N. Y. 377. The court may authorize a receiver to borrow money, and issue negotiable certificates of indebtedness therefor, creating a first lien, when necessary for the management and preservation of the property: Meyer v. Johnston, 9 Am. Ry. Rep. 454 (Supr. Ct. Ala., June term, 1875); S. C. 53 Ala. 237, 15 Am. Ry. Rep. 467. And see Hoover v. Montclair & Greenwood Lake Ry. Co., 29 N. J. Eq. 4, 18 Am. Ry. Rep.



which, as far as practicable, the direction or approbation of the court should be consulted and conformed to, as absolute upon the subject.<sup>1</sup> He can not expend moneys except as actually necessary for the preservation of the property in his hands, without leave of the court; but losses of goods in transportation will be ordered to be paid for out of the earnings of the road.<sup>2</sup>

An order of sequestration, and for the appointment of a receiver of an insolvent railroad company, will be made upon a proper showing by the creditors of the company, or others of suitable interests.<sup>3</sup> Upon the appointment of such receiver,

565. But such liens will not displace older liens: *Meyer v. Johnston, supra*. But see *Hoover v. M. & G. I. Ry. Co., supra*. To authorize the issuance of such certificates there should be a detailed statement of the items needed and the purpose thereof, supported by clear proof of its correctness, and of the necessity for the step. There should also be proper notice to, and hearing of, parties interested: *Ibid.* But the chancellor can not authorize the selling of such interest bearing certificates at less than their face value, and thus disregard the laws against usury: *Ibid.* Such certificates, when issued to one not entitled thereto, are void, even in the hands of an innocent holder: *Turner v. Peoria & Springfield R. R. Co., 95 Ill. 134; S. C. 1 Am. & Eng. R. R. Cas. 348*. And if made payable to A B "or bearer," when authorized to be made payable to A B "or order," and negotiated by mere delivery, the holder takes it subject to any equitable defenses existing against the payee: *Ibid.* By the statute in Illinois, such certificates, made payable to a particular person, must be assigned by indorsement in order to enable the assignee to sue in his own name: *Ibid.* Such certificates are not negotiable instruments, and are open to all defenses against the payee when held by another: *Ibid; Union Trust Co. v. Chicago*

*& L. H. R. R. Co., 7 Fed. Repr. 513; S. C. 1 Am. & Eng. R. R. Cas. 629, 630.*

<sup>1</sup> *Cowdrey et al. v. The Railroad Co., 3 Otto (93 U. S. Sup. Ct.), 352.*

<sup>2</sup> *Cowdrey et al. v. Railroad Co., 3 Otto (93 U. S. Sup. Ct.), 352.* But see *Dexterville Mfg. & Boom Co. v. Case, 4 Fed. Repr. 873; S. C. 1 Am. & Eng. R. R. Cas. 630*. Under an order directing a receiver to pay debts "owing to laborers and employes, for labor and services actually done in connection with the company's railways," he may pay a claim of counsel for professional services rendered on employment of the company in litigation relating to the railway: *Gurney v. Atlantic & Great Western Ry. Co., 58 N. Y. 358, 9 Am. Ry. Rep. 520*. An indebtedness for services rendered or materials furnished, prior to the appointment of the receiver, may be paid by him: *Meyer v. Johnston, supra; Williamson v. Washington City, Va. Midland & Great Southern R. R. Co., 33 Gratt. 624; S. C. 1 Am. & Eng. R. R. Cas. 498*. Thus the claim of another company for freight transported will be ordered paid: *Meyer v. Johnston, supra*.

<sup>3</sup> *Rankine v. Elliott, 16 N. Y. 377; Robinson v. Atlantic & Great West. Ry. Co., 66 Penn. St. 160; Fisher v. The Concord R. R. Co., 50 N. H. 200; Matter of Long Branch & Sea Shore*

all the property stock, things in action and effects of the company become vested in him, for the benefit of the creditors of the company, and subject to the orders and disposition of the court.<sup>1</sup> This right and power of the receiver includes the exclusive right to enforce the payment of unpaid balances due from stockholders to the company upon their subscriptions to the capital stock;<sup>2</sup> and though the statute gives the creditors the right to recover such unpaid balances, when necessary to meet the debts of the company, yet as such stockholders can not respond to both the creditors and the receiver, and are not liable to both for one and the same claim, and as the office of receiver draws to it and carries with it the right to all the assets, for the benefit of all creditors alike, and all of whom the receiver represents, the receiver, after his appointment, has the sole right to maintain such actions; and therefore judgment creditors and other creditors of the corporation will be enjoined, at the suit of such receiver, from further prosecuting their claims against the stockholders of the corporation.<sup>3</sup> If the claim of some be of such a character as to amount to a lien, or to be entitled to a preference, a creditor being allowed to prosecute, his individual action might obtain an unjust preference over others, and even over those who themselves may be entitled to priority of payment;\* but by subjecting all the available means of the company to the administration and distribution of the court, the property and assets, by its final order or judgment, will be distributed, or the proceeds thereof will be distributed, among all classes of creditors and claimants, not only in proportion to their respective claims, but in the order of priority to which they are entitled.<sup>5</sup>

R. R. Co., 9 C. E. Green, N. J. Ch. Reps., 398; *State v. Northern Cent. Ry. Co.*, 18 Md. 193.

<sup>1</sup> *Rankine v. Elliott*, 16 N. Y. 377; *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160; *Mil. & St. Paul R. R. Co. v. The Mil. & Minn. R. R. Co. and others*, 20 Wis. 165. But the corporation is not thereby dissolved: *Kincaid v. Dwinelle*, 59 N. Y. 548; *Willink v. Morris Canal & Bkg. Co.*, 3 Green Ch. 377; *State v. R. R. Comrs.*, 12 Vroom, 235; *Ahrens v. State Bank*, 3 S. Car. (N. S.), 401.

<sup>2</sup> *Rankine v. Elliott*, 16 N. Y. 377; *Mil. & St. Paul R. R. Co. v. The Mil. & Minn. R. R. Co. and others*, 20 Wis. 165.

<sup>3</sup> *Rankine v. Elliott*, 16 N. Y. 377.

<sup>4</sup> *Rankine v. Elliott*, 16 N. Y. 377, 381; *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160.

<sup>5</sup> *Rankine v. Elliott*, 16 N. Y. 377, 381. Such is the rule, too, whether the proceeding be allowed at law to creditors by statute, or is sought in equity, wherein it exists independent of statutory provisions.

When the work of construction of a railroad is suspended for want of means of the company to continue the same, and by reason thereof valuable interests dependent on the completion of the road, and which are necessary to the security of bondholders, whose moneys, secured by such bonds, are invested in the structure, and without the prompt prosecution and completion of the work will be lost or endangered, a receiver will be appointed, on the application of the bondholders, to take charge and possession of the road, and cause the same to be completed.<sup>1</sup> Such possession may extend to all the material interests, lands and rolling stock of the company, including the right and title subsequently to be perfected and obtained, by the completion of the road by such receiver, to lands, the title of which is dependent on the completion thereof; also the road-bed, tracks, bridges, viaducts, fences, culverts, freight houses, machine shops, and other structures and buildings; and all locomotives and other rolling stock; and all material, fuel, tools and implements appurtenant to the road; and also of all franchises and privileges of the road or company, and all the estate, right and title of the company to the whole and every part thereof, in law and in equity.<sup>2</sup> In such case the receiver will be authorized and empowered, by the court appointing the same, to proceed promptly with the construction of the road, and to the completion thereof, and for that purpose to borrow money and issue or execute securities therefor, as a lien upon the road and appurtenances, land and interests, in such manner as shall be specified by the court; and to do and perform all acts proper and necessary to procure and perfect the title to any and all lands, or any land grant to such company, granted or intended to be granted by Congress to the same.<sup>3</sup>

Assignees and receivers in bankruptcy are neither agents nor servants of the corporation bankrupt.<sup>4</sup> In case of a sale of a railroad, fixtures, rolling stock or franchises by the receiver or assignee, the corporate entity or capacity does not pass to the purchasers, and they do not thereby become a corporation, nor do they become stockholders in the corporation.<sup>5</sup> The purchas-

<sup>1</sup> *Kennedy v. The St. Paul & Pacific R. R. Co.*, 2 Dillon's C. C. R., 448.

<sup>2</sup> *Kennedy v. St. Paul & Pacific R. R. Co.*, 2 Dillon's C. C. R., 448.

<sup>3</sup> *Kennedy v. The St. Paul & Pacific*

*R. R. Co.*, 2 Dillon's C. C. R., 448.

<sup>4</sup> *Metz, Admr., v. The Buffalo, Corry & Pittsburg R. R. Co.*, 58 N. Y. 61.

<sup>5</sup> *Metz, Admr., v. The Buffalo, Corry & Pittsburg R. R. Co.*, 58 N. Y. 61.

ers are not liable for injuries resulting from the negligence of the receiver, assignee, or others operating the road, occurring after the sale and before the confirmation thereof. Such sales are made subject to confirmation by the court, and are not complete until confirmed.<sup>1</sup>

Although the courts have full power to appoint, and do appoint, receivers to take charge of the management and running of railroads, and operate the same, yet the directors are not thereby prevented from discharging their functions as such in other respects. The mere placing the running operations of the road under the control of a receiver neither vacates the offices of the directory nor paralyzes their actions in such matters as do not interfere with the duties of the receiver.<sup>2</sup> But if there be a conflict involving an uncertainty as to who are the legal directory, a receiver will be appointed, superseding all the claimants until the question be legally settled.<sup>3</sup>

**2. Suits against receivers.**—Ordinarily, to sue a receiver, leave must be had of the court wherein the receiver is appointed, and the suit must be brought in the same court;<sup>4</sup> for the business of his receivership being in the custody of the law and of that particular court, and his actions in respect thereto being all subject

<sup>1</sup> Metz. Admr., *v.* The Buffalo, Corry & Pittsburg R. R. Co., 58 N. Y. 61.

<sup>2</sup> Stevens *v.* Davison, 18 Gratt. 819.

<sup>3</sup> Stevens *v.* Davison, 18 Gratt. 819. The rescission of an order appointing a receiver, "without prejudice to any one," is not a defense to a possessory warrant for an engine sued out against such officer before the rescission; and if he surrender the engine to the company he will be liable: Peacock *v.* Pittsburg Locomotive and Car Works, 52 Geo. 417, 7 Am. Ry. Rep. 147. Power to appoint implies power to remove, and this power may be exercised in vacation: Cincinnati, Sandusky & Cleveland R. R. Co. *v.* Sloan, 31 Ohio St. 1, 15 Am. Ry. Rep. 376. And this, too, notwithstanding the application may be informally made: Coe *v.* New Jersey Midland Ry. Co., 28 N. J. Ch. 31, 14 Am. Ry. Rep. 9. A receiver may appeal from a decree set-

ting his accounts after the sale, and directing him to pay a certain sum of money into court: Hinckley *v.* Gilman, Clinton & Springfield R. R. Co., 4 Otto, 467, 16 Am. Ry. Rep. 217. In proceedings for the appointment of receivers, the court will not take jurisdiction of any other matters than those pertaining to the preservation of the property. No question in relation to elections will be considered: Taylor *v.* Phil. & R. R. Co., and Farmers' & Mech. Nat. Bank *v.* Same, 7 Fed. Repr. 381; S. C. 1 Am. & Eng. R. R. Cas. 627.

<sup>4</sup> *In re* McElrath, 2 Dillon's C. C. R., 460; Minnesota Co. *v.* St. Paul Co., 2 Wall. 609, 632, 633; Freeman *v.* Howe, 24 How. 460; Randall *v.* Howard, 2 Black, 586; Robinson *v.* Atlantic & Great West. Ry. Co., 66 Penn. St. 160.

to the supervision and control of the court, and likewise under its protection,<sup>1</sup> no action against the receiver, or in reference to the interests in his hands or under his care, will lie, except by leave of the court to which he is bound to respond.<sup>2</sup> The more regular and ordinary way is for the aggrieved party to apply, by petition, to the court, which, in a proper case, will afford summary relief.<sup>3</sup>

But if suit be permitted, or is maintainable, against a receiver, it is no objection thereto that the road is run by, and the act complained of is the joint act of, the receiver and a lessee of the road, who jointly run and operate the same; in such case they may be sued jointly, if suit be permitted against the receiver or the company itself, or the lessee may be sued separately for his act.<sup>4</sup>

If the proceeding and appointment of a receiver be in a state court, then litigation will not lie in regard to the subject-matter of the receivership in the federal court, although the citizenship of the parties is such as would otherwise confer jurisdiction on the United States courts.<sup>5</sup> And so if the receiver be appointed by the federal court, then litigation in regard thereto must be in that court.<sup>6</sup>

In the case cited from 2 Wallace,<sup>7</sup> the Supreme Court of the United States, MILLER, Justice, lay down the rule in the following language: "If in the hands of the receiver of the Circuit Court, nothing can be plainer than that any litigation for its possession must take place in that court, without regard to the citizenship of the parties (citing *Freeman v. Howe*, 24 Howard, 460). If it has been taken illegally from the custody of the receiver, it is equally clear that the court has not lost thereby the jurisdiction over the property, or the right to determine where it shall go; so far as that right is involved in that suit."

But notwithstanding an action will not lie against a receiver

<sup>1</sup> *La Crosse Railroad Bridge*, 2 Dillon's C. C. R., 465; *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160.

<sup>2</sup> *Ante*, note 4, p. 894.

<sup>3</sup> *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553.

<sup>4</sup> *Alexandria & Washington R. R. Co. v. Brown*, 17 Wall. 445.

<sup>5</sup> *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 633.

<sup>6</sup> *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632, 633. And see, to the same point, *Milw. & St. Paul R. R. Co. v. Milw. & Minn. R. R. Co.*, 20 Wis. 165.

<sup>7</sup> 2 Wall. 609, 632, 633.

for property belonging to a railroad corporation placed in his hands under authority of the court, yet such is not the case in relation to property in his possession and in use by him upon the road, but which does not in fact belong to the corporation, and which is not of the property such receiver was authorized by the decree of his appointment to take into his possession and control. As to all such as the decree does not authorize the receiver to control and possess, an action in any of the ordinary forms will lie, if a proper occasion occur therefor. Hence, an action of replevin, by the owner thereof, will lie against a receiver for a locomotive in his possession, and used upon the road of which he is receiver.<sup>1</sup>

And so, although it is the law that an action may not be maintained against a receiver appointed by the court, in relation to property or interests confided to him by the judicial authority that appoints him, without the permission of the court to prosecute the same, yet suit may be brought against a receiver appointed in one state, who is running a railroad as a common carrier, in the courts of another state, when the action is brought for matter involved in running such road therein as a common carrier.<sup>2</sup> And we can see no reason why such suit may not be brought in either state.

At common law, a railroad or other corporation, whose road or structure is in the possession of a receiver judicially appointed by a competent court to take charge thereof and operate the same, is not liable to an action, and neither is the receiver, without leave of the appointing court, for the act of such receiver, or of his servant, in charge of such road or works. Injuries inflicted by such receiver or his servants in carrying on the business, by negligence or otherwise, are not attributable to the corporation. The possession of the receiver is not the possession of the railroad corporation, but is antagonistic thereto. The receiver is under the control of the court. His possession is the possession of the court. His acts are not the acts of the corporation; and the corporation has no control thereof. An effort to control them would be punishable by the court.<sup>3</sup>

<sup>1</sup> *Parker v. Browning*, 8 Paige, 388; *Paige v. Smith*, 99 Mass. 395; *Leighton v. Harwood*, 111 Mass. 67; *Hills v. Parker*, 111 Mass. 508, 510, 511.

<sup>2</sup> *Paige v. Smith*, 99 Mass. 395.

<sup>3</sup> *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560; *Wiswall v. Sampson*, 14 How. 52; *Angel v. Smith*

No action, therefore, will ordinarily lie against the company for the acts of, or injuries inflicted by, the receiver, or by his servants or employes.<sup>1</sup> Nor will an action therefor lie against the receiver himself, as such; for a receiver cannot be sued in respect to the matter of his receivership, except by permission first obtained from the court that appoints him.<sup>2</sup> But it does not follow that the injured person is without a remedy. On the contrary, his remedy is to be sought for by petition to the court who appointed the receiver, which, "upon sufficient proof, will grant the relief to which the sufferer may be entitled."<sup>3</sup> Anything seemingly to the contrary of this in the cases of *McKinney v. The Ohio & Mississippi Railroad Company*, heretofore considered,<sup>4</sup> and the *Ohio & Mississippi Railroad Company v. Fitch*,<sup>5</sup> is sufficiently explained by the fact that the liability in these cases was not predicated upon negligence of the receiver, or of his servants, nor upon their acts, either of right or of wrong, but was statutory, and was a liability imposed upon the railroad corporation by an express statute of a police nature, for a failure to fence its road; and there being no exception in the statute as to roads in the hands of receivers, the statute could but take its course, and therefore these actions were sustained against the corporation itself.<sup>6</sup> As, for instance, where, by law, liability is fixed upon the corporation for the enforcement of a statutory right of action for injuries of a specific character which are not actionable at common law, and an action therefor is given against the company, then, notwithstanding the road be in the hands of a receiver, and the wrong be suffered, or the injury be inflicted, in the operating thereof whilst thus in the receiver's hands, yet the action is in such case to be brought against the company;<sup>7</sup> but in case of recovery, no execution can go upon the

9 Ves. 335. See *Hopkins v. Connel*, 2 Tenn. Ch. 323; *Wabash Ry. Co. v. Brown*, 5 Bradw. (Ill.), 590.

<sup>1</sup> *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560, 561.

<sup>2</sup> *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560, 561; *Cardot v. Barney*, 63 N. Y. 281; *Hopkins v. Connel*, *supra*.

<sup>3</sup> *Ohio & Miss. R. R. Co. v. Davis*, *supra*.

<sup>4</sup> 22 Ind. 99.

<sup>5</sup> 20 Ind. 498.

<sup>6</sup> *Ohio & Mississippi R. R. Co. v. Davis*, 23 Ind. 553, 560, 561. For any recovery against the company in such statutory action, the receiver will, of course, be directed by the court appointing him to provide for and pay out of the assets of the company or road in his hands.

<sup>7</sup> *McKinney v. Ohio & Miss. R. R.*

judgment against property in the receiver's hands, or subject to his powers, but the remedy for satisfaction of the judgment is by application for payment to the court wherein the business or matter of the receivership is pending.<sup>1</sup>

In the case cited from 22 Indiana, 99, the action was for an injury to live stock in operating an unfenced road, when the statute required it to be fenced, and subjected the company to an action and liability to pay for stock so injured, as for want of a fence; hence, the gist of the action was not the negligence of the receiver or his servants operating the road, but the omission of the company to fence. There being no right of action for this at common law, it followed that the statutory right of action must be pursued as by the statute required, that is, against the company, for the fact of the receiver having possession of the road could not operate to exonerate the company from the liability imposed by the law. To do so, would be in effect to repeal the law in respect to such railroads as should come under the control of a receiver. So, too, in the case of the *Ohio & Mississippi R. R. Co. v. Fitch*, 20 Ind. 498. That, also, was a like action for statutory liability, where the remedy was expressly given by an action against the company, and in like manner, as for want of a fence.

And so an action will lie against the receiver, as such, for his wrong act or negligence in operating the road, and may be brought against him, as such, in his character and description as receiver, for redress of injuries received, and the right of recovery will be determined upon the same principles of law as if the suit was against the company itself for the like acts or omissions; but to sustain such action against the receiver, leave to sue must first be had of the court from whose appointment his receivership is derived.<sup>2</sup> In case of recovery, the judgment

Co., 22 Ind. 99; *Louisville, New Albany & Chi. R. R. Co. v. Cauble*, 46 Ind. 277.

<sup>1</sup> *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553, 560.

<sup>2</sup> *Ohio & Miss. R. R. Co. v. Davis*, 23 Ind. 553; *Klein v. Jewett*, 11 C. E. Green, 474; *Jordan v. Wells*, 3 Woods, 527; *Meara's Admr. v. Holbrook*, 20 Ohio St. 137; *Kennedy v. Indianapolis*

*lis, C. & L. R. R. Co.*, 2 Flippin, 704; S. C. 10 Repr. 359, 11 Cent. L. J. 89. In Tennessee it is held that a receiver, appointed under Sec. 1101 of their code, becomes vested with the powers and duties of the board of directors in managing the affairs of the company, and is a public agent of the state: *Erwin v. Davenport*, 9 Heisk. 44, 19 Am. Ry. Rep. 274. The state



is to be satisfied, not by the receiver personally, but by the funds in the hands of the receiver, as part of the subject of his receivership.<sup>1</sup>

A receiver of a railroad company engaged in transporting and carrying, as a common carrier, persons or property, is likewise liable, as such, for losses and injuries to freights, injuries to persons, and other wrongs inflicted, or wrongful exactions, and may be sued for such; but such action can only be brought by leave of the court.<sup>2</sup>

No action can be maintained against a receiver after his discharge. The purchaser at a foreclosure sale takes subject to all claims against the receiver, when the court has reserved the power to enforce against the property all liabilities incurred by the receiver.<sup>3</sup>

**3. Execution levy of property in the possession of a receiver.**—Property in the hands of a receiver under authority of the court is in the custody of the law, and is not subject to execution or attachment levy.<sup>4</sup> To allow property so situated to be levied upon and sold by legal process, would not only cause a conflict of jurisdiction, and interfere with the duties and rights of the receiver in the management and administration of the property, which he exercises under the authority and direction of the court by which he is appointed, but would defeat the power of the court appointing the receiver to make an equitable and rightful application of the proceeds among those entitled to it in law, and will not be permitted.<sup>5</sup> If a creditor thinks the

does not guarantee their fidelity, and is not responsible for their misfeasance or nonfeasance in office, nor, generally, are they responsible for similar dereliction of duty on the part of their sub-agents; but where such agents are guilty of positive wrong to others, they are liable to the same extent as private agents. So that for mere negligence they are not liable: *Ibid.* And see *Hopkins v. Connel*, 2 Tenn. Ch. 323.

<sup>1</sup> *In re McElrath*, *In re Easton*, 2 Dill. C. C. R., 460.

<sup>2</sup> *In re McElrath*, *In re Easton*, 2 Dill. C. C. R., 460; *Blumenthal v. Brainerd*, 38 Vt. 402; *Newell v. Smith*,

49 Vt. 255, 17 Am. Ry. Rep. 100; *Allen v. Cent. R. R. Co.*, 42 Ia. 683; *Wabash Ry. Co. v. Brown*, 5 Bradw. (Ill.), 590; *Kain v. Smith*, 80 N. Y. 458.

<sup>3</sup> *Farmers' Loan and Trust Co. v. Cent. R. R. Co.*, 2 McCrary, 181; S. C. 7 Fed. Repr. 537, 1 Am. & Eng. R. R. Cas. 630. But see *Brown v. Wabash Ry. Co.*, 96 Ill. 297, 1 Am. & Eng. R. R. Cas. 626; S. C. 5 Bradw. (Ill.), 590.

<sup>4</sup> *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160.

<sup>5</sup> *Robinson v. Atlantic & Great West. Ry. Co.*, 66 Penn. St. 160.

property not properly in the hands of the receiver, or that the demands for which it is placed there are unjust, it is his duty to apply to the same court which appointed the receiver and placed him in possession thereof, for its discharge from legal custody, that he may proceed against it by suitable process in his own behalf. But it can not be wrested by piecemeal from the custody of the law by adverse proceedings.<sup>1</sup> Not even a suit will lie against a receiver, except by permission of the court appointing him. The party aggrieved is to apply for relief to that same court.<sup>2</sup>

**4. Jurisdiction as between federal and state courts.**—As to the jurisdiction of the federal and the state courts over the subject-matter of the receivership, and over the receiver himself in his capacity as such, the well settled rule is, that the tribunal whose jurisdiction first attaches to the same will retain the exclusive jurisdiction thereof as against all other courts of merely concurrent powers; and no interference is allowed from such other, either as to the action of the receiver necessary to the discharge of his trust, or in reference to the subject-matter thereof.<sup>3</sup> Moreover, for any interference by process or proceedings in another court, an injunction will lie against the party prosecuting the same.<sup>4</sup>

**5. His rights may be protected by injunction.**—In case of interference with the assets or interests committed to the custody and charge of the receiver, by judicial process or proceedings against the same, by creditors or others, calculated to divert the same from the regular course of administration of the court making his appointment, an injunction will lie, on proper application, to restrain the party or parties from such interference, to the end that equal distribution of the whole of the assets may be made amongst the parties in interest, according to their several rights and priorities.<sup>5</sup>

<sup>1</sup> Robinson v. Atlantic & Great West. Ry. Co., 66 Penn. St. 160.

<sup>2</sup> *Supra*, subdivision 2.

<sup>3</sup> Robinson v. Atlantic & Great Western Ry. Co., 66 Penn. St. 160;

Ohio & Miss. R. R. Co. v. Fitch, 20 Ind. 498; Minnesota Co. v. St. Paul Co., 2 Wall. 609.

<sup>4</sup> Rankine v. Elliott, 16 N. Y. 377.

<sup>5</sup> Rankine v. Elliott, 16 N. Y. 377.

## CHAPTER XLIV.

### JUDICIAL AND EXECUTION SALES OF RAILROADS, AND RAILROAD STOCKS AND PROPERTY, AND SALES FOR TAXES.

	Section.		Section.
No execution sales thereof at common law: the remedy is by sequestration . . . . .	1	execution sales . . . . .	4
Execution sales and sequestration under the statute . . . . .	2	Sales for taxes . . . . .	5
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Fraudulent and void judicial and		Redemption from mortgage and execution sale . . . . .	7
		Reorganization by purchasers . . . . .	8

**1. No execution sales thereof at common law; the remedy is by sequestration.**—The corporate franchises, rights and property of a railroad corporation, incident thereto, can not at common law be seized or sold upon execution at law against the company;<sup>1</sup> nor can the appurtenances, easements, appliances or works used for the practical operation of the road, be levied upon or sold at law upon execution separate from the franchise, any more, or more legally, than the whole can be sold together. Such sale would impair its value, and impede its use by the public.<sup>2</sup> Nor can the income, tolls or product of the franchise or road be seized on such execution process, so as to cut off the right of the corporate company to demand, receive and control the same, or in any manner to divest the company of its ownership and

<sup>1</sup> *Gue v. Tide Water Canal Co.*, 24 How. 263; *Rorer on Judicial and Ex. Sales*, sec. 1068; *Coe v. Columbus, P. & I. R. R. Co.*, 10 Ohio St. 372; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290; *Youngman v. Elmira & W. R. R. Co.*, 65 Penn. St. 278; *Bayard's Appeal*, 72 Penn. St. 453, 454; *Thomas v. Armstrong*, 7 Cal. 286; *Stewart v. Jones*, 40 Mo. 140; *Hatcher v. Toledo, Wabash & Western R.*

*Co.*, 62 Ill. 477; *James v. The Pontiac & Groveland Plank Road Co.*, 8 Mich. (4 Cooley), 91.

<sup>2</sup> *Ammant v. New Alexandria & Pittsburg Turnpike Co.*, 13 S. & R. 212; *Plymouth R. R. Co. v. Colwell*, 39 Penn. St. 337; *Youngman v. Elmira & Williamsport R. R. Co.*, 65 Penn. St. 278; *Gue v. Tide Water Canal Co.*, 24 How. 257; *Rorer on Judicial and Ex. Sales*, sec. 1069.

possession thereof;<sup>1</sup> nor the rolling stock and other property necessary and proper for carrying on the business of the road—these are incident to the franchise.<sup>2</sup>

In some of the states, however, there is an exception to the general rule, as in New Hampshire, for instance, where it is holden that cars and locomotive engines may be levied upon and sold, if not in actual use.<sup>3</sup>

Lands, or an easement therein, held by a railroad company for depot grounds, right of way, and other necessary purposes of conducting the business, are not subject to execution sale; and the principle is the same, if merely for right of way, whether the lands or easement therein be taken by the company under the right of eminent domain, or be conveyed to it by grant of the owner. In either case the use, within the quantity limited as allowed to be taken by law, is for railroad purposes only, and a reversion to the former owner is the result of non-user thereof, and of course of a sale or transfer thereof, if the same could be made to a person not authorized to use them for the objects of the enterprise and franchise for which they were taken, or by grant obtained. Nor can the company itself sell them in parcels separate from the franchise.<sup>4</sup>

Moreover, even if subject to sale on execution, a railroad can not be levied upon and sold in separate parcels, in different counties, or in any county through which it may pass. Such sale, if valid, would break up the connection of the continuous line, and defeat the purposes of the law in regard to the road, rendering it less useful to the public as a means of transportation and travel.<sup>5</sup>

Nor will a sale, by whatever means effected, and however valid, of the mere property of a railroad corporation, carry with

<sup>1</sup> Rorer on Judicial and Ex. Sales, sec. 1069, pp. 344, 345, 346; *Gue v. Tide Water Canal Co.*, 24 How. 257; *Leedom v. Plymouth R. R. Co.*, 5 Watts & Sergt. 265.

<sup>2</sup> Rorer on Judicial and Ex. Sales, 346, sec. 1070; *Leedom v. Plymouth R. R. Co.*, *supra*.

<sup>3</sup> Rorer on Judicial and Ex. Sales, sec. 1070; *Boston, Concord & Montreal R. R. Co. v. Gilmore*, 37 N. H. 410.

<sup>4</sup> *Hill v. The Western Vermont R.*

*Co.*, 32 Vt. 68; *Western Penn. R. R. Co. v. Johnston*, 59 Penn. St. 290; Rorer on Judicial and Ex. Sales, sec. 1071; *Ammant v. Turnpike Co.*, 13 S. & R. 210; *Leedom v. Plymouth R. R. Co.*, 5 W. & S. 265.

<sup>5</sup> *Macon & Western R. R. Co. v. Parker*, 9 Geo. 377; Rorer on Judicial and Ex. Sales, sec. 1070; *Dayton, Xenia & Belpre R. R. Co. and others v. Lewton*, 20 Ohio St. 401.

t the corporate franchise or corporate capacity. The corporation may still exist, although its property and pecuniary means are all gone, and will, until judicially extinguished for non-user or other cause.<sup>1</sup>

The only remedy at common law for a judgment creditor is by sequestration, as railroads and railroad tolls are not subject to judgment liens, and the road itself can not, as we have seen, be sold on execution at law, upon general principles. The tolls are but the product of the franchise, and are in no wise an interest in land susceptible of becoming the subject of a judgment lien. Nor is the franchise itself subject to a judgment lien, or an execution sale at law; and the remedy at law, as against the tolls, is by writ of sequestration on the judgment at law.<sup>2</sup>

It results from these principles that where a judgment creditor obtains a writ of sequestration against the company, that moneys for tolls received by the sequestrator who is in possession under his writ, are not to be paid to the judgment creditor who thus obtains the writ, to the exclusion of other creditors, but are to be distributed by the court among the creditors of the company generally, in proportion to the amount of their respective claims.<sup>3</sup>

In some of the states, the proceeding by sequestration has been provided for and regulated by statute, which, except as to variation of details, is but the re-enactment of the common law. Such was the case in Pennsylvania under the act of the legislature of 16th of June, 1836, in reference to executions. On the return of a *fi. fa.* against a corporation unsatisfied, and after demand made for the amount of the same upon the chief officer of the company, or officer in charge of the principal office, the creditor could, upon petition therefor, have a writ of sequestration, and sequester the goods, chattels, credits, issues, profits, tolls and receipts of the corporation.<sup>4</sup> But this remedy was abolished and superseded by the act of 7th April, 1870, which radically changed the mode of procedure. By this act, instead

<sup>1</sup> Bruffett and others v. The Great Western R. R. Co., 25 Ill. 353, 356; *ante*, chap. 42, subd'n 1.

<sup>2</sup> Ammant v. The New Alexandria & Pittsburg Turnpike Co., 13 Sergt. & Rawle, 210; Leedom v. The Plymouth R. R. Co., 5 Watts & Sergt. 265; S.

C. 2 Am. R. W. Cas. 232; Reid v. The Northwestern R. R. Co., 32 Penn. St. (8 Casey), 257.

<sup>3</sup> Leedom v. The Plymouth R. R. Co., 5 Watts & Sergt. 265.

<sup>4</sup> Phila. & Baltimore Central R. R. Co.'s Appeal, 70 Penn. St. 355.

of sequestration, predicated upon the return of a *fi. fa.*, under the act of 1836, unsatisfied in whole or in part, an alias *fi. fa.* issues to seize and sell the franchises and property of the delinquent corporation.<sup>1</sup> Thus the old remedy by sequestration was abolished in said state, and was superseded by the present one of levy and sale.<sup>2</sup> In such cases the execution levy does not give an exclusive lien to the plaintiff, but the funds arising from sales of the property and franchises of the corporation are to be distributed and applied in like manner as in cases of distribution of the assets of an insolvent person or company.<sup>3</sup>

Railroads, strictly speaking, are not real estate;<sup>4</sup> and therefore the law of judgment liens on real estate is not applicable to railroads.<sup>5</sup> The result follows, from this principle, that on an execution sale of a railroad where this rule prevails, there being no provision of statutory law to the contrary, the proceeds of such sale go as go the proceeds of sales of ordinary personal property, in the distribution of such proceeds among judgment and execution creditors.<sup>6</sup>

**2. Execution sales and sequestration under the statute.**—Execution sales of intangible corporate interests can only be made, in proceedings at law, when authorized by statute, as we have seen under the preceding title of this chapter, and from the authority there cited. It follows therefrom that such levies and sales of incorporeal interests of the company, in proceedings against the company, and of capital stocks in proceedings against stockholders, as judgment debtors, must be made in strict conformity to the requirements of the statute, and must be evidenced by a return of the officer, showing such conformity; for the interest being intangible and incapable of delivery, the title can only pass by proper evidences of sale, and not by delivery, as in cases of sales of ordinary personal property, the title to which vests in the officer by the levy and corporal possession, and passes over to the purchaser on sale and actual delivery to him.<sup>7</sup>

<sup>1</sup> Phila. & Baltimore Cent. R. R. Co.'s Appeal, 70 Penn. St. 355; Bayard's Appeal, 72 Penn. St. 453.

<sup>2</sup> Phila. & Baltimore Cent. R. R. Co.'s Appeal, 70 Penn. St. 355; Bayard's Appeal, 72 Penn. St. 453.

<sup>3</sup> Bayard's Appeal, 72 Penn. St. 453.

<sup>4</sup> Scogin v. Perry, and the S. Pacific

R. R. Co., 32 Texas, 21.

<sup>5</sup> Scogin v. Perry, and the S. Pacific R. R. Co., *supra*.

<sup>6</sup> Scogin v. Perry, and S. Pacific R. R. Co., *supra*.

<sup>7</sup> Titcomb v. Union M. & F. Ins. Co., 8 Mass. 326; Davis v. Maynard, 9 Mass. 242; Hammatt v. Wyman, 9 Mass. 138;

Unsatisfied bonds of a railroad company belonging to itself, but in the hands of another person, are holden to be subject to execution in Iowa. Thus, where a railroad company issues its bonds, negotiable and payable to bearer, and afterwards contracts to receive a portion of the same in payment of a debt due to the company, with a view to put them again into circulation, and after perfecting the contract so as to discharge the debt due the company, but previous to the bonds coming into its possession, such bonds are levied on by an officer by virtue of a writ of execution against the company, it is holden that choses in action being by law liable to levy and execution sale, the levy was therefore valid, and that a sale of the bonds would pass to the purchaser the ownership thereof, if in other respects legal and regular.<sup>1</sup>

In Iowa it is provided by statute that "The franchise of a corporation may be levied upon under execution and sold," but that "the corporation shall not become thereby dissolved"; and that "no dissolution of the original corporation shall affect the franchise"; and that "the purchaser becomes vested with all the powers of the corporation therefor." The statute also provides that "Such franchise shall be sold without appraisement."<sup>2</sup>

By the Iowa code of 1850, it is enacted that "When the franchise of a corporation has been levied upon under an execution and sold, the corporators shall not have power to dissolve the corporation so as to destroy the franchise, and if they neglect to keep up an organization sufficient to enable the business to proceed, the purchaser thereupon becomes vested with all the powers of the corporation requisite therefor; and when it becomes impracticable for an individual so to conduct them, and in cases where doubts or difficulties not herein provided for arise, the purchaser may apply by petition to the district court, which is hereby vested with authority to make any orders requisite for carrying into effect the intent of this chapter in this respect."<sup>3</sup>

Howe v. Starkweather, 17 Mass. 240; James v. Pontiac & G. Plank Road Co., 8 Mich. 91; Taylor v. Jerkins, 6 Jones, N. C. (Law), 316; Stamford Bank v. Ferris, 17 Conn. 259; Rorer on Judicial & Ex. Sales, Secs. 1073, 1074, 1075 to 1080.

<sup>1</sup> Hetherington & Winslow v. Hay-

den, Sheriff, 11 Iowa, 335.

<sup>2</sup> General Incorporation Law, Code of 1873, Sec. 1086, p. 187.

<sup>3</sup> General Incorporation Law of Iowa, of 1850, Code of 1850, Sec. 700; Revision of 1860, Sec. 1177. We have thus gone back to the law of 1850, because several of our Iowa railroad

Execution sales of the franchises of a corporation can only be made in Michigan by virtue of the special statute subjecting them to sale, and defining the method thereof; and the officer holding the writ must proceed in accordance with such statute, and not under the general law of writs of execution.<sup>1</sup> The proper manner of sale under such special statute, is to sell for such limited period as will raise the amount necessary to pay the judgment and costs. The bidder who will pay the same for the use of the franchise and property for the shortest time, is in a legal sense the highest bidder, and is entitled to have the property struck off to him as such.<sup>2</sup> If a sale cannot be effected in such manner, it is then the duty of the officer to return that fact with the writ, that the court may take such other measures as the statute affords. Execution sales made otherwise than in accordance with the statute authorizing them are void, although the purchaser obtain possession of the property and make expensive betterments thereon.<sup>3</sup>

In the case cited from 39 Pennsylvania St. Reports, *Plymouth Railroad Company v. Colwell and Jacoby*, a remarkably lucid distinction is drawn by WOODWARD, Justice, between the liability and non-liability of lands belonging to railroad corporations to sale on writs of execution. It is that lands belonging to the company, and not dedicated to corporate purposes, are bound by judgment liens, are liable to levy and sale upon execution, and may be levied upon and sold by the sheriff, or other proper officer enforcing the writ, with the same effect as lands of any other debtor; but that lands which are appropriated to corporate objects, and are necessary for the full enjoyment of the corporate franchises of the company, whether acquired by purchase, or by the exercise of the delegated power of eminent domain, are entirely exempt from such liens, and from execution levy and sale.<sup>4</sup> But such exemption is not by reason of any corporate prerogative, or corporate immunity; it rests upon the public interests involved in the corporation as common carriers, and in

corporations originated under that law.

<sup>1</sup> *James v. Pontiac & Groveland P. R. Co.*, 8 Mich. 91.

<sup>2</sup> *James v. Pontiac & Groveland*

*Plank Road Co.*, 8 Mich. (4 Cooley), 91, 94, 95.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Plymouth R. R. Co. v. Colwell & Jacoby*, 39 Penn. St. 337. •



the use of the road.<sup>1</sup> Though the corporation, in respect to its capital, is private, yet it is in law created to accomplish objects of public interest, and to that end is its authority, not only to take and hold lands by purchase, but to take lands by force of the law, under the right of eminent domain delegated to it by the state. In the attainment of this end the public will not be balked, either by the act of the company in selling what is necessary for operating the road and is appropriated thereto, nor by allowing its creditors to sell the same under execution at law.<sup>2</sup> For the sake of the public, then, whatever is essential to the exercise of the corporate functions shall be retained by the company. The only remedy for a creditor by law, in such cases, is by sequestration: which remedy is consistent with the corporate existence, unity of the property and service of the public. It touches the tolls, and not the material substance of the corporation, or property thereof. The corporation could not perform or accomplish the purpose of its creation after the ground on which the rails rest was sold to a stranger, if such sale were valid in law.<sup>3</sup> But this exemption does not extend to a whole tract of land, merely because a part thereof is occupied for railroad purposes, and is dedicated to that service. On the contrary, the part not thus devoted to the necessary use of the road is, like other lands of other persons, liable to execution levy and sale.<sup>4</sup>

It follows from these principles that an execution levy and sale of a tract of land belonging to a railroad corporation, and through which its road passes, or upon which are located other works incident and necessary to the proper use of the road, and to enable the company to discharge its duties to the public, will carry the title of the company, all things else being in law sufficient, as to the part of the land not in necessary use by the road; and on the other hand will convey no title at all to the purchaser as to such part of the land as is in the proper and necessary use of the corporation, as dedicated to, and necessarily incident to, the proper operation of the corporate franchise.<sup>2</sup> And although, in case of such an execution sale, the lands actually occupied by the debtor corporation for railroad purposes

<sup>1</sup> *Plymouth R. R. Co. v. Colwell & Jacoby*, 39 Penn. St. 337.

<sup>2</sup> *Plymouth R. R. Co. v. Colwell*, 39 Penn. St. 337.

<sup>3</sup> *Plymouth R. R. Co. v. Colwell & Jacoby*, 39 Penn. St. 337.

<sup>4</sup> *Plymouth R. R. Co. v. Colwell & Jacoby*, 39 Penn. St. 337.

may not have been acquired by it within the time limited by law for it to obtain them,\* and thereby its right to hold the same for corporate purposes be such as to render it subject to ouster therefrom, as to the exercise of corporate rights in that respect, by proceedings on the part of the government, yet under and by virtue of such execution sale and purchase, the purchaser will not be allowed to oust the company therefrom in a private action, nor can a forfeiture of charter privileges be declared in such collateral proceeding.<sup>1</sup>

In Texas, the franchise, track and effects of railroad corporations are liable to execution levy and sale.<sup>2</sup> Though the franchise and road be thus sold, the corporation is not thereby dissolved; nor do the functions of the directors cease, except in regard to that which is thus sold.<sup>3</sup> If there remain other assets of the company, they are vested in the directory, in trust for the remaining creditors, if any; and if there are no remaining creditors, then in trust for the stockholders. If there be other creditors, this remaining property is still subject to further execution sale in their behalf.<sup>4</sup>

Under the practice of the law of mortgages in Pennsylvania, the remedy of the bondholder of a railroad mortgage with power of sale, must, for such breaches as remedies are provided for therein, proceed in the manner pointed out by the terms of the mortgage.<sup>5</sup> A court of equity will not interpose or lend its powers to enforce a different remedy than the one provided by the parties themselves. Thus, where the power is, that on default of payment when the principal debt is due, the trustee may enter and take possession and sell the road, no such sale will be coerced in equity for a mere default in the payment of interest; and where a specific remedy for the latter is provided, as, for instance, the taking possession and operating the road, and applying the net receipts to the payment of the debts, then such specific

<sup>1</sup> *Plymouth R. R. Co. v. Colwell & Jacoby*, 39 Penn. St. 337. And what portion of the grounds is in the actual and necessary use of the road, in such cases, is a question of fact for the jury :*Ib.*

<sup>2</sup> *Good v. Sherman et al.*, trustees, 37 Tex. 661. The proceeds of sale are to be distributed as if proceeds of per-

sonal property: *Ib.*

<sup>3</sup> *Good v. Sherman et al.*, trustees, 37 Tex. 661.

<sup>4</sup> *Good v. Sherman et al.*, trustees, 37 Tex. 661.

<sup>5</sup> *Bradley v. The Chester Valley R. R. Co. et al.*, 36 Penn. St. (12 Casey), 141.

remedy must be pursued. There being no trust duty omitted in merely omitting to sell, which, in fact, the party in such case has no power to do, the court will not take upon itself the exercise of such power, and thereby contravene the express provisions of the mortgage contract.<sup>1</sup> Outside of such special remedies as the parties by their own act have provided for, the courts of Pennsylvania, except in cases requiring the enforcement of trusts, and the compulsion of trustees to perform their trust duties, will leave the holders of such securities to the remedies at law, by *scire facias*, or as at common law. The courts of equity have no power to interfere except in matters of trust.<sup>2</sup>

And even where execution sales are by statute allowable, there can be no levy or sale of property which is in the hands of a receiver, who acts by judicial appointment, to receive and control the same. The property so situated is in the custody of the law, and of the court by whom the receiver is appointed, and can not be interfered with by process or orders from any other tribunal.<sup>3</sup> Such interference would bring about a conflict of jurisdiction, calculated to defeat the just administration of the law by the tribunal whose receiver is in possession of the property, and would be a contempt of such court.<sup>4</sup> If remedies are desired against the possession and action of the receiver, application is to be made to the same court by which he is appointed.<sup>5</sup>

The property of solvent corporations, including railroad corporations, in the state of Pennsylvania, is subject by statute to execution in the ordinary form.<sup>6</sup> Insolvent ones are to be proceeded against by sequestration.<sup>7</sup> Such is there held to be the law in relation to execution levy and sale of property held for

<sup>1</sup> *Bradley v. The Chester Valley R. Co. et al.*, 36 Penn. St. (12 Casey), 141.

<sup>2</sup> *Bradley v. The Chester Valley R. Co. et al.*, 36 Penn. St. (12 Casey), 141. And herein it is suggested that the case of *Mendenhall v. The West Chester & Phil. R. R. Co.* (unreported, we believe) is scarcely to be regarded as authority, it having been decided by a divided court, and then again taken under consideration for rehearing, and settled by the parties before a

decision.

<sup>3</sup> *Robinson v. The Atlantic & Great Western Ry. Co.*, 66 Penn. St. 160.

<sup>4</sup> *Robinson v. The Atlantic & Great Western Ry. Co.*, 66 Penn. St. 160.

<sup>5</sup> *Robinson v. The Atlantic & Great Western Ry. Co.*, 66 Penn. St. 160.

<sup>6</sup> *Oakland Railway Co. v. Keenan*, 56 Penn. St. 198; *Reed v. Penrose*, 12 Casey (36 Penn. St.), 240.

<sup>7</sup> *Oakland Railway Co. v. Keenan*, 56 Penn. St. 198.

corporate purposes. Outside property, not of corporate necessity, is held in said state to be subject to legal process of creditors, in the manner of other debtors.<sup>1</sup>

But an execution levy and sale, in said state, of lands of a railroad corporation, subject to the right of the company "to lay, keep and retain its railway tracks over" the same, carries only "the company's title to the land, subject to the servitude of their right as a railroad company." Such being the levy and sale, such is the form, says WOODWARD, Ch. J., in which the purchaser must enjoy his purchase.<sup>2</sup>

A railroad or other corporation established by law, can not, in said state, even under the statute, be interrupted in the exercise of its corporate franchises by a levy and sale in proceedings by a private creditor.<sup>3</sup> Equity will restrain such a proceeding.<sup>4</sup> It can only be put out of existence, or stripped of what is essential to its existence, by public authority, and not by a private suitor.<sup>5</sup>

And equity will prevent the sale of a railroad in parcels, on execution, in Georgia.<sup>6</sup>

The easement of the right of way appurtenant to a railroad is, in contemplation of law, perpetual in its character, and when vested by payment, passes with the road on a forced sale thereof, made under authority of law. Such interest is assignable with the road, by the company, and the purchaser will succeed to the right thereof unimpaired, whether the sale be made by voluntary act of the company, or be enforced by legal authority of the government for the collection of indebtedness due to the state.<sup>7</sup>

Stocks in a railroad corporation, in Pennsylvania, standing in a debtor's name upon the books of the company, may be proceeded against by writ of *fiery facias*, under the act of 29th March, 1819, or by writ of attachment under the act of 16th of June,

<sup>1</sup> Oakland Railway Co. v. Keenan, 56 Penn. St. 198.

<sup>2</sup> Oakland Railway Co. v. Keenan, 56 Penn. St. 198.

<sup>3</sup> Oakland Railway Company v. Keenan, 56 Penn. St. 198, 203.

<sup>4</sup> Oakland Railway Co. v. Keenan, 56 Penn. St. 198, 203.

<sup>5</sup> Oakland Railway Co. v. Keenan, 56 Penn. St. 198, 203; Plymouth R.R.

Co. v. Colwell, 3 Wright (39 Penn. St.), 337; Shamokin Valley R. R. Co. v. Livermore, 11 Wright (47 Penn. St.), 465.

<sup>6</sup> Noble *et al.* v. The State of Ala., 43 Geo. 466.

<sup>7</sup> Junction R. R. Co. v. Ruggles, 7 Ohio St. 1, 7; Hatch v. Cin. & Ind. R. R. Co., 18 Ohio St. 92.

1836, at the election of the creditor, and in such procedure subjected to execution sale, if no other owner, or valid objection to such proceeding, be shown.<sup>1</sup> If a party other than the apparent owner of record on the company's books claim to be the owner thereof, such complainant may intervene in the proceedings to assert his ownership and protect his rights, if any he has.<sup>2</sup>

If there be reason to apprehend a lien of the company or of others upon the stocks, then the safer proceeding of the two is by attachment, in which proceeding the liability of the stocks may be settled before sale, and thereby subsequent litigation be avoided. This suggestion comes from the court more immediately in view of the statutory lien of banking corporations in certain cases, but is equally applicable in such a proceeding where a lien of any kind may be supposed to exist upon the stocks sought to be levied upon and sold.<sup>3</sup>

Capital stock of a railroad company in Vermont is by statute subject to execution levy and sale for the corporate debts of the company; and when so levied upon and sold is again liable, not only for subsequent, but also for existing, debts of the company in the hands of such purchaser, and so on indefinitely, upon the principle that each purchaser in turn becomes a stockholder and corporator in the company, and all the stock of all persons bearing that relation to the debtor is liable to execution sale for the debts of the corporation. The statute makes no distinction.<sup>4</sup>

**3. Judicial sales.**—Judicial sales, as contra-distinguished from execution sales, which are ordinarily on a judgment and execution at law, are sales made in equity, by the order and decree of the chancellor, or judge exercising chancery powers. In these

<sup>1</sup> *Weaver v. Huntingdon & B. T. M. R. R. & C. Co.*, 50 Penn. St. 314.

<sup>2</sup> *Weaver v. Huntingdon & B. T. M. R. R. & C. Co.*, 50 Penn. St. 314.

<sup>3</sup> In the consideration of this case, the court advert to *Lex v. Patten*, 16 Penn. St. (4 Harris), 295, and say that it goes no further than to hold that stock may be sold under the act of 29th March, 1819, and does not decide that stock held by the defendant in his own name, and not claimed by another, can not be taken on execution under the 34th sec. of the act of June

16, 1836.

<sup>4</sup> *Chandler v. Henry*, 30 Vt. 330. In New Hampshire, locomotive engines and cars not in use may be levied upon and sold on execution, and seized on attachment: *Boston, C. & M. R. R. Co. v. Gilmore*, 37 N. H. 410. The statute of Kentucky concerning judicial sales of railroads, etc., approved March 7, 1876, is not superseded by sec. 694 of the civil code of practice: *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush, 678, 18 Am. Ry. Rep. 221.

latter sales the officer or person selling acts not by virtue of his office, if he be an officer, but whether an officer or a private person is appointed to that duty by the court in the decree, he acts by authority of, and under the direction and supervision of, the court.<sup>1</sup> The court not only directs what he shall sell, but how he shall sell, and also the terms of sale; the particular manner, and sometimes place, of selling; the conveyance to be made after the return of the sale, and its approval or affirmance by the court;<sup>2</sup> and will, if necessary, in the exercise of its plenary powers in chancery, put the purchaser into possession of the premises or property sold,<sup>3</sup> and to that end may arrest, fine or imprison, or do both, for the enforcement of obedience to its mandates.<sup>4</sup>

Such sales, whether they be made by a marshal, sheriff, or commissioner, are always regarded as under the control of the court, and subject to the power of the court to confirm or to set aside the sale for good cause, or to open the sale, and cause the property to be offered anew at any time before confirmation thereof, if the circumstances of the case are such as to require the exercise of such a power.<sup>5</sup> For though a bid be accepted, yet the sale is not thereby rendered final, but must be reported to the court for confirmation; and the bidder thereby becomes a party to the suit,<sup>6</sup> and may appear before the court to represent or defend his own interests, and may be compelled by the court to comply with the terms of his bid.<sup>7</sup>

The Supreme Court of the United States lay down this prin-

<sup>1</sup> Blossom v. R. R. Co., 3 Wall. 196, 207.

<sup>2</sup> Blossom v. R. R. Co., 3 Wall. 196. The officer who is to make the sale should be named in the decree: Waco Tap R. R. Co. v. Shirley, 45 Tex. 355, 13 Am. Ry. Rep. 233. In case of a consolidated company, where the companies have mortgaged their roads before consolidation, the court may sell the property of the consolidated company as a whole, and distribute afterwards: Gibert v. Washington City, Va. Midland & Great Southern R. R. Co., 33 Gratt. 586; S. C. 1 Am. & Eng. R. R. Cas. 473.

<sup>3</sup> Blossom v. R. R. Co., *supra*.

<sup>4</sup> Blossom v. R. R. Co., *supra*.

<sup>5</sup> Blossom v. R. R. Co., 3 Wall. 196, 207; The Covington & Lexington R. R. Co. v. Bowler's heirs, 9 Bush, 468.

<sup>6</sup> Minnesota Co. v. St. Paul Co., 2 Wall. 609, 634; Blossom v. R. R. Co., 3 Wall. 196, 207; Delaplaine v. Lawrence, 10 Paige, 602; Covington & Lexington R. R. Co. v. Bowler's heirs, 9 Bush, 468.

<sup>7</sup> Blossom v. R. R. Co., 3 Wall. 196, 207; Smith v. Arnold, 5 Mason C. C. R., 420; Covington & Lexington R. R. Co. v. Bowler's heirs, 9 Bush, 468.

ciple (MILLER, Justice) as follows:<sup>1</sup> "In the case of *Blossom v. Milwaukee & Chicago Railroad Company*, this matter was fully discussed, and it was there held, that a purchaser or bidder at a master's sale, subjected himself *quoad hoc* to the jurisdiction of the court, and became so far a party to the suit by the mere act of making a bid, that he could appeal from any subsequent order of the court affecting his interest." And to the same point see, also, the very late case of *The Covington & Lexington Railroad Company v. Bowler's heirs et al.*, 9 Bush (Ky.), 468.

The officer or other person authorized to conduct a judicial sale has a discretionary power of adjournment, subject, however, to the superior control of the court;<sup>2</sup> and an unaccepted bid at such a sale will not prevent the exercise of such a power, if fair in other respects, and it be done from proper motives.<sup>3</sup> If, after such bid in a mortgage foreclosure, the sale be adjourned, and before the sale is resumed or perfected the debtor pay off the debt and costs, the person making the unaccepted bid has no claim to enforce the same, and the decree will be satisfied.<sup>4</sup> A mere bid at a judicial sale, until accepted by the master or person selling, and confirmed by the court, confers no rights upon the bidder which he can judicially enforce.<sup>5</sup>

A judicial sale of a railroad and its franchises under a mortgage foreclosure and decree, made *bona fide*, carries to the purchasers, free from liability for debts of the debtor corporation, all the assets, interest and franchises of the company, where, by law and the decree of the court, the same may thus fully pass. And where there is, at the time of such sale, a statute law in force, authorizing the purchasers thereof to become incorporated, and declaring them such, the purchasers become, by such sale and purchase, a new company and corporation, without any privity between itself and the prior corporate body for whose indebtedness the road is thus sold, and is, therefore, not liable for any of the old company's obligations or liabilities; and neither are the assets of the old company so liable, which have thus become the property of the new one.<sup>6</sup> Nor does the fact that, after such purchase *bona fide* made, and without any prior understanding in

<sup>1</sup> *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 634.

<sup>2</sup> *Blossom v. R. R. Co.*, 3 Wall. 196.

<sup>3</sup> *Blossom v. R. R. Co.*, 3 Wall. 196.

<sup>4</sup> *Blossom v. R. R. Co.*, 3 Wall. 196

<sup>5</sup> *Blossom v. R. R. Co.*, 3 Wall. 196.

<sup>6</sup> *Stewart's Appeal*, 72 Penn. St

291.

respect thereto, stockholders of the old company thus extinguished be allowed to become stockholders of the new one, without making any payment for the stock obtained by them, by an arrangement between themselves and the new company, made and having its inception subsequent to the purchase at such judicial sale, but before the actual organization of the new corporation, invalidate such sale. There being no privity between the two corporations, and the latter not being the successor of the former, but a new one, taking its franchises and effects by judicial and adversary proceedings, and in nowise by collusion or contract with such stockholders, it takes the property and franchises in its own right, free from liability for debts of the former corporation.<sup>1</sup> But where the sale, though partaking of the formalities and semblance of a judicial adversary sale, is made, and the proceedings had, to carry out a prior arrangement between the intended purchasers and the stockholders of the debtor corporation, with intent, by fraud and collusion, to thus cut off the claims of the other creditors, and to let in the old stockholders to the benefits of the purchase, as stockholders free of cost in the new company, thereby giving to such stockholders of the extinct corporation priority, in effect, in the assets of the old corporation, when in equity they should be postponed to the creditors' rights—in such case equity holds the transaction, in regard to the stockholders, fraudulent and void, and gives the creditors the benefit of the interest thus fraudulently diverted to the stockholders.<sup>2</sup>

A sale of a railroad, in the course of judicial proceedings and the foreclosure of a mortgage on the road, with its "corporate franchises and appurtenances," and certain real estate by description, carries with it only such other real property or interests

<sup>1</sup> Stewart's Appeal, 72 Penn. St. 291. Not so, however, if there be evidence of fraud or collusion between the stockholders thus admitted to the new organization and the purchaser at such judicial sale: *ib.*, and *Chicago, R. I. & P. R. R. Co. v. Howard*, 7 Wall. 392. But, to our mind, the very fact of admission to stockholdership by the new company, gratuitously, raises the presumption of, or is, at least, a badge

of, fraud, that should cast the *onus* on to the party thus acting to show the purity of the transaction. The mariner who wrecks his own ship, however innocently, should not be permitted to participate with the wreckers in the spoils. The policy of the law forbids it.

<sup>2</sup> *Chicago, R. I. & P. R. R. Co. v. Howard*, 7 Wall. 392.



therein as are appurtenant to the road, and as are essential to the enjoyment of the franchise, as by union and identity therewith.<sup>1</sup> Grounds that are merely in some manner servient to the road, do not come within or pass by the description of "corporate franchises and appurtenances."<sup>2</sup> The question here arose in an action of ejectment, wherein the adverse parties were the purchasers under the mortgage foreclosure and sale, and a purchaser under an execution issued on a judgment rendered against the mortgagor. The proceedings under which both parties respectively derived title, were at law—the mortgage foreclosure being by *scire facias* under the statute, and a sale thereon by the sheriff, and the other proceeding being by an ordinary judgment, and an execution sale thereon by the sheriff; neither party, or those under whose rights they claimed, being made adverse parties to the respective proceedings which eventuated in the respective sales. Thus both parties in the action of ejectment traced the source of their titles to the mortgagor. Therefore the case turned on the rights of the mortgagee, as to whether the lots in question passed under the description, "corporate franchises and appurtenances." The court held that these terms did not pass the lots under the mortgage and sale, *per se*; and as to the fact of their actual use and occupancy for railroad purposes as necessary to the franchise, that was rightly referred to the jury, as a question of fact for them to settle. The jury found for the plaintiffs (who made title under the ordinary judgment) as to all the property except "that part of the lots already used for railroad tracks, making the southern break of said road embankment the line" between the parties. Thus, in the language of the supreme court, who affirmed the judgment, "the finding of the jury separated the part actually used for the track of the road, and left it in possession of the defendants below."<sup>3</sup>

The purchasers of the property and franchises of a railroad corporation at a mortgage sale, who are a corporation in law, possessed of all the powers and of the name of the debtor corporation, by virtue of a statutory provision to that effect, are nevertheless a distinct and separate corporate body from the debtor corporation, and are in no sense liable for any debts of the lat-

<sup>1</sup> Shamokin Valley R. R. Co. v. Liv-  
ermore, 47 Penn. St. (11 Wright), 465.

ermore, 47 Penn. St. (11 Wright),  
465.

<sup>2</sup> Shamokin Valley R. R. Co. v. Liv-

<sup>3</sup> 47 Penn. St. 465, 475.

ter, any further than by agreement.<sup>1</sup> But there may be a valid agreement between the stockholders and unsecured creditors, after a judicial sale of the road, that a reorganization be so made that the stockholders and unsecured creditors of the old shall become stockholders in the new corporation.<sup>2</sup> Such mortgage sale, except so far as saved by agreement, or the terms thereof, cuts off all the rights of the old company, and the reorganization, so called, is entirely a new company.<sup>3</sup>

Where the equitable interest of a railroad company, held by it under a contract of purchase, is divested out of the company by a judicial or execution sale for the purchase money, and a portion thereof is occupied by the road-bed, track, and other possessions of the company, and the purchaser has prosecuted an action of ejectment to judgment, proceedings on such judgment will be stayed for a reasonable time to enable the company to protect the road and its accessories on the land by assessment, condemnation, and payment therefor, under the statute, of the quantity allowed by law to be taken by the right of eminent domain.<sup>4</sup>

By a judicial sale of a railroad and its franchises, upon a decree foreclosing a mortgage lien of the state, and a purchase thereof by the state upon such sale, both the lien and the corporation are extinguished. Such sale destroys the objects for which the corporation was created, and the charter franchise is reinvested in the state, from whence it emanated.<sup>5</sup> And being so reinvested in the state, where the state thus becomes the purchaser of a railroad, with its franchises and property rights and interests, under a trust sale, the state may by law re-grant the same, to the full extent purchased and held, to the same or to some other corporate body.<sup>6</sup> When thus re-granted to a different corporate body, such grantee holds it free from former liabilities, and the legislative act re-granting the same, with all the rights of the former corporate owner, does not operate to revive, reinstate or

<sup>1</sup> *Vilas v. The Mil. & Prairie du Chien Ry. Co.*, 17 Wis. 497; *Smith v. Chicago & N. Western Ry. Co.*, 18 Wis. 17.

<sup>2</sup> *Smith v. The Chicago & Northwestern Ry. Co.*, 18 Wis. 17.

<sup>3</sup> *Smith v. The Chicago & Northwestern Ry. Co.*, 18 Wis. 17, 22.

<sup>4</sup> *Pittsburg & Steubenville R. R. Co. and others v. Jones and others*, 59 Penn. St. 433.

<sup>5</sup> *Moore and others v. Whitcomb*, 48 Mo. 543.

<sup>6</sup> *Huff v. The Winona & St. Peter R. R. Co.*, 11 Minn. 180; *Hilbert v. Same*, 11 Minn. 246.

continue the former corporation in the new one thus becoming the owner of the road; and such new corporation is not liable for any of the old corporation's debts.<sup>1</sup>

The sale of a railroad under a mortgage and judicial foreclosure, will not invest the purchaser with the unpaid-for right of way occupied by the debtor railroad company as a right of way for its road, where such occupancy is without any act of the landowner postponing his right to compensation. Such landowner, having never parted with his right, or ever been compensated therefor, or ever consented to forego the same, stands on the higher fundamental right of property, that it shall not be taken or used by any one without just compensation therefor; and as such right is a constitutional one, and not to be frittered away by mere refinements of law, it follows that the escape of the original taker from payment will not invest his successor with a similar right and perpetual immunity, where no conduct of the landowner is shown to estop him from enforcing payment under the law.<sup>2</sup>

Nor will such sales carry to the purchaser an exemption from taxation enjoyed by the debtor corporation under the law. The exemption is not property, or a franchise capable of being sold, but is a mere personal privilege granted to the corporation, and does not become an attribute of the road, franchise and property of the company. It is not as if the property itself was exempted.<sup>3</sup>

Sales of railroads in Louisiana for a mortgage debt, made under judicial seizure and order of court, when only a part of the mortgage debt is matured—as coupon warrants, for instance—are made for the whole debt, and of the whole road.<sup>4</sup> So much of the purchase money as will discharge the costs and all over-due coupons or installments, whether held by the seizing creditor or by others, is to be paid in cash, not to exceed, however, the amount of the bid.<sup>5</sup> If the amount be less than the whole of

<sup>1</sup> *Huff v. The Winona & St. Peter R. R. Co.*, 11 Minn. 180; *Hilbert v. Same*, 11 Minn. 246.

<sup>2</sup> *Western Penn. R. R. Co. v. Johnston*, and *Same v. Stewart*, 59 Penn. St. 290; *Drury v. Midland R. R. Co.*, 127 Mass. 571; *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653.

<sup>3</sup> *Morgan v. The State of Louisiana*, 3 Otto (93 U. S. Sup. Ct.), 217.

<sup>4</sup> *Branner et al. v. Hardy, Sheriff, et al.*, 18 La. An. 537; *Gordon et al. v. The Vicksburg, Shreveport & Texas R. Co.*—opposition of *Branner et al.*, 18 La. An. 550.

<sup>5</sup> *Ibid.*

such overdue liabilities of the mortgage, its application will be *pro rated* between the holders of such liabilities. If the amount of the bid be more than the aggregate of the over-due coupons or installments, the overplus or surplus becomes payable at the same time of the maturing of the then unmatured portion of the mortgage, and remains in the hands of the purchaser, who becomes liable and bound to discharge such subsequently maturing payments, not to exceed in amount the amount of his bid; and the mortgage itself remains in force, and continues to subsist as a lien against the road in his hands to secure such subsequent payments, instead of being extinguished by the decree and sale.<sup>1</sup> Thus the railroad finds a new owner, and the creditors a new debtor, in the person of the purchaser. In case the purchaser fail to meet the cash payment, or so much thereof as may be payable to the officer, the latter may re-sell the property on the same day.<sup>2</sup>

In the distribution of the proceeds of a sale, judicially made, of the franchises and property of a railroad, none can be let in for a share thereof except those designated as the recipients in the decree of sale.<sup>3</sup> And although there be bondholders who are deferred as to payment, and who were not personally made defendants to the proceedings in a mortgage foreclosure, yet they are regarded as legally in court where their mortgage trustee is made a defendant, and are bound by the proceedings.<sup>4</sup> If there be any fraud or collusion between the plaintiff in the proceeding and their trustee, their remedy is against the trustee for his injurious conduct, or else to apply to the court to vacate the decree for fraud;<sup>5</sup> and they will in such case no doubt have a right to pursue both. The relief obtained by opening the decree will not cut off the right of action against the trustees for unfaithfulness.

Though a judicial sale relates back to the inception of the lien of record, as, when the decree and sale is in a proceeding for

<sup>1</sup> *Branner et al. v. Hardy, Sheriff, et al.*, 18 La. An. 537; *Gordon et al. v. The Vicksburg, Shreveport & Texas R. R. Co.*—opposition of *Branner et al.*, 18 La. An. 550.

<sup>2</sup> *Branner et al. v. Hardy, Sheriff, et al.*, 18 La. An. 537; *Gordon et al. v. The Vicksburg, Shreveport & Texas R.*

*R. Co.*—opposition of *Branner et al.*, 18 La. An. 550.

<sup>3</sup> *McElrath v. Pittsburg & Steubenville R. R. Co.*, 68 Penn. St. 37.

<sup>4</sup> *McElrath v. Pittsburg & Steubenville R. R. Co.*, 68 Penn. St. 37.

<sup>5</sup> *McElrath v. Pittsburg & Steubenville R. R. Co.*, 68 Penn. St. 37.

the foreclosure of a mortgage, the sale bears relation to the date of recording the mortgage, cutting off all intervening ordinary liens, yet it does not destroy or take precedence of a lien for taxes. The latter does not stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless it be otherwise provided by statute; for the claim for taxes attaches to the *res*, without regard to the ownership thereof, as against everybody, and all liens or claims. One taking a mortgage, judgment or other lien, takes, as one in buying property takes it, subject to all subsequent taxes.<sup>1</sup> But if it were otherwise in respect to such priority, yet a purchaser at such judicial sale would have no relief against the taxes, for the rule of *caveat emptor* applies to all such sales. The buyer takes but what he gets, and would have no equity to be indemnified for tax liens, nor to be allowed to apply enough of the purchase money to discharge the same.<sup>2</sup>

Nor is the effect of that relation such as to give the purchaser a right to the benefits, rents or fruits of the property purchased, accruing during the interim between the day of sale and the day of perfecting the same by the payment of the purchase money, and the making of the conveyance and final order of confirmation. During this interval the ownership of the property is not changed.<sup>3</sup> But, as is before shown, when the sale is completed by all these formalities and substantials, the title then, as against intervening claims of title, relates back, not only to the day of sale, but if sold in satisfaction of a lien, reaches back in its relation to the very inception of record of that lien.<sup>4</sup>

**4. Fraudulent and void judicial and execution sales.**—Fraud vitiates every transaction into which it enters, and renders contracts of bargain and sale void, or else voidable, whether the same be made and covered over under the semblance of sales at law or in equity.<sup>5</sup>

Therefore a fraudulent judicial sale of a railroad is not only

<sup>1</sup> *Osterberg v. The Union Trust Co.*,  
3 Otto (93 U. S. Sup. Ct.), 424, 428.

<sup>2</sup> *Osterberg v. The Union Trust Co.*,  
3 Otto, 424, 428.

<sup>3</sup> *Osterberg v. The Union Trust Co.*,  
3 Otto (93 U. S. Sup. Ct.), 424, 429;  
*Rorer on Jud. and Ex. Sales*, Sec. 134.

<sup>4</sup> *Rorer on Judicial and Ex. Sales*,  
Sec. 809.

<sup>5</sup> *Sampeyreac v. The United States*,  
7 Pet. 222; *United States v. The*  
*Amistad*, 15 Pet. 518; *Cheongwo v.*  
*Jones*, 3 Wash. C. C. R., 359; *Bell v.*  
*Nimmo*, 5 McLean, C. C. R., 109.

void, but can not be legalized and confirmed by legislative enactment. The exercise of such power is not only unconstitutional, but is extra legislative and void, and will be disregarded by the judicial department of the government, in the exercise of the legitimate function of the latter of declaring such sales void.<sup>1</sup> Such sales will not only be set aside for fraud, but relief will be given by coercing a restoration of the property.<sup>2</sup> And a combination of stockholders or officers of a railroad corporation, to have sold, and to buy in at such judicial sale, under semblance of law, a railroad at a reduced price (or indeed at any price), is fraudulent, and will be ground for setting aside the sale and for relief, if a sale be accordingly effected, and result in a purchase by them.<sup>3</sup> They can not buy or deal in the matter of their trust, nor both buy and sell.<sup>4</sup>

And so a judicial sale of a railroad, under a decree of foreclosure of a mortgage, made upon a notice representing the amount due greatly in excess of the real indebtedness, and calculated in its character to deter persons from bidding, and to prevent fair competition at the sale, and where the sale itself is conducted by the mortgagee as auctioneer, who bids in the property for certain of the bondholders and directors who were instrumental in making the mortgage, is grossly fraudulent, and will be set aside as such.<sup>5</sup> Such sale will not only be vacated in equity, but the purchasers and company formed under the sale will be perpetually enjoined from setting up any claim or title under the same; the mortgage will be ordered to remain as security for the bonds in the hands of *bona fide* holders; and the judgment creditors prosecuting the proceeding to void the sale, will be permitted to enforce their claim against the company, subject to prior liens and incumbrances.<sup>6</sup>

And so a judicial sale of a railroad or its material, brought about by fraud and collusion of the directors with the purchasers

<sup>1</sup> *White Mountains R. R. Co. v. White Mountains (N. H.) R. R. Co.*, 50 N. Hamp. 50; S. C. 1 Am. R. R. Repts. 146.

<sup>2</sup> *White Mountains R. R. Co. v. White Mountains (N. H.) R. R. Co.*, 50 N. Hamp. 50.

<sup>3</sup> *White Mountains R. R. Co. v. White Mountains (N. H.) R. R. Co.*,

50 N. Hamp. 50.

<sup>4</sup> *Fisher v. Concord R. R. Co.*, 50 N. Hamp. 200; S. C. 1 Am. R. R. Repts. 230, 231.

<sup>5</sup> *James v. Milw. & Minn. R. R. Co.*, 6 Wall. 752.

<sup>6</sup> *James v. Milw. & Minn. R. R. Co.*, 6 Wall. 752.

thereat, will be treated as fraudulent and void, and will be set aside in equity, and the purchaser will be treated as a trustee, to the full value of the property received and interest thereon, for the benefit of *bona fide* creditors and others interested in the road.<sup>1</sup> It is the duty of the directors, irrespective of any separate interests of themselves, to administer the trust committed to their charge for the mutual benefit of all persons interested, and they can not secure an advantage to themselves which is not common to all others, without committing a breach of trust and a fraud.<sup>2</sup>

And a supposed judicial sale of railroad stocks under a decree of a so-called Confederate court of the Confederate States government, is void for illegality and want of authority in the supposed court; and the purchaser, as in all other cases under orders or decrees of courts having no authority to act, or no power to exercise jurisdiction, takes no title.<sup>3</sup> Such Confederate tribunal being the creature of an organization gotten up to resist and destroy the legitimate national government in certain states thereof, its acts are illegal and void, and it is powerless to confer title by its decrees, or sales made in pursuance thereof.<sup>4</sup>

The sale of that which is not ordered to be sold, or if ordered, has not been advertised, where a sale is being made under a mortgage foreclosure and decree, is void, although the property thus sold without being included in the order of sale, or if so included yet be not advertised, be included in the mortgage. The sale is not made by virtue of the mortgage, but in virtue of the decree. If made without an order of sale it is void; and if the property is ordered to be sold, and yet be sold without notice, the sale is not only void, but is fraudulent in law, and will be accounted void.<sup>5</sup>

**5. Sales for Taxes.**—The courts of some of the states hold that rolling stock of railroad companies may be seized and sold

<sup>1</sup> *Drury v. Cross*, 7 Wall. 299; *Covington & Lexington R. R. Co. v. Bowler's heirs and others*, 9 Bush (Ky.), 468.

<sup>2</sup> *Drury v. Cross*, 7 Wall. 299; *Covington & Lexington R. R. Co. v. Bowler's heirs*, 9 Bush (Ky.), 468.

<sup>3</sup> *Central R. R. and Banking Co. v. Ward*, 37 Geo. 515; S. C. 1 With-

row's Corp. Cases, 299.

<sup>4</sup> *Central R. R. and Banking Co. v. Ward*, 37 Geo. 515; S. C. 1 Withrow's Corp. Cases, 299.

<sup>5</sup> *Osterberg v. The Union Trust Co.*, 3 Otto (93 U. S. Sup. Ct.), 424, 429; *Rorer on Jud. and Ex. Sales*, Sec. 477, 480.

by the tax gatherer for taxes;<sup>1</sup> and this, too, though subject to, or covered by, a deed or deeds of mortgage.<sup>2</sup> In the latter principle there is nothing novel or questionable. All property which is subject to taxes may be sold for the same, and the lien thereof overrides not only mortgages, but liens of every description.

**6. Sequestration and sale of stock by Confederate Courts.—**

The sequestration and sale of capital stock of a railroad company, as belonging to alleged alien enemies, citizens of the United States, by proceedings in, and by order or decree of, a Confederate Court, during the late rebellion, and the transfer thereof, by the company on their books, to the Confederate States receiver, made by order of such court, confers no valid title to such stock, and the same will not defeat the claim of the original owner thereof.<sup>3</sup> There being no successful maintenance of the Confederate power and rebellion, it follows that the parties preferring the claim predicated upon such proceedings, “derive their title to the railroad stock under proceedings of an unauthorized and unrecognized organization,” which having “failed, and ceased to exist,” “their title thereto, being so derived, failed with it.”<sup>4</sup>

**7. Redemption from mortgage and execution sales.—**Whether the sale of a railroad be made upon an ordinary execution on a judgment at law, where such sales are allowed by statute, or upon special execution in cases of mortgage foreclosure, or upon judicial order or decree in equity foreclosures—in either case the local or statutory law of the state on the subject of redemption, if there were such at the time of contracting the liability on which the judgment or decree is predicated, having entered into and become a part of the contract, will govern as to the right of the defendant debtor or mortgagor to redeem from such sales, or such of them as shall occur in cases coming within the purview thereof. If redemption be thereby allowed from sales on ordinary execution—sales of real property—then redemption will be allowable from such sales of railroads. If redemption be allowed from sales of realty made on special execution, then

<sup>1</sup> Randall, *Exr., v. Elwell and another*, 52 N. Y. 521.

<sup>2</sup> Randall, *Exr., v. Elwell and another*, 52 N. Y. 521.

<sup>3</sup> *Central R. R. and Banking Co. v. Ward and others*, 37 Geo. 515.

<sup>4</sup> *Central R. R. and Banking Co. v. Ward*, 37 Geo. 515.



from sales of railroads made on special execution redemption will be allowed. And if redemption be allowed from sales of real property (or expressly of railroads) made upon decrees of foreclosure of mortgages, either upon the decree itself or upon special writs of execution issued thereon, then redemption will be allowed from sales of railroads made upon such special executions or decrees;<sup>1</sup> for they are regarded as real property.<sup>2</sup> And this right of redemption, existing in virtue of, and as part of, the contract, is a law of right, as well as of practice, and will govern, in such cases, as well in the national as in the state courts.<sup>3</sup>

But where the sale is of a road partly situated in two different states, redemption would seem to be impracticable, where the road is sold as an entirety, and the laws of the different states are not the same.

It does not follow, however, that a decree and sale are void for the reason that no provision is made therein for redemption as allowed by statute, although a deed be made, instead of giving a certificate of redemption, and the same be confirmed; for while, on the one hand, the proceeding is of no force to prevent a party from redeeming who has the right to do so, yet if he do not exercise or assert that right within the time limited, he by such omission loses the same, and the sale is thereby affirmed or affirmable, the same as if it had been expressly made subject to redemption, and the party declined or omitted to redeem.<sup>4</sup>

In Iowa it is by statute declared that the word "lands," and the phrases "real estate" and "real property," include lands, tenements, hereditaments, and all rights thereto and interests therein, equitable as well as legal;<sup>5</sup> that railroad corporations may issue bonds, and mortgage their roads; that, to secure the rights of the mortgagees or parties interested, "the rolling stock and personal property of the company properly belonging

<sup>1</sup> *Bronson v. Kinzie*, 1 How. 311; *Clark v. Reyburn*, 8 Wall. 318; *Brine v. Ins. Co.*, 96 U. S. (6 Otto), 627; *Suitterlin v. Conn. Mut. Life Ins. Co.*, 90 Ill. 483.

<sup>2</sup> *Blac.*, chap. 2, 17, 18; *Van Keuren and wife v. Cent. R. R. Co.* of N. J., 38 N. J. 165; Same case, 13

*Am. Ry. Rep.* 43; 1 Wash. on Real Property, p. 3.

<sup>3</sup> *Brine v. Insurance Co.*, 96 U. S. (6 Otto), 627; *U. S. v. Fox*, 94 U. S. 315.

<sup>4</sup> *Suitterlin v. Conn. Mut. Life Ins. Co.*, 90 Ill. 483.

<sup>5</sup> Code of 1873, sec. 1285, p. 235.

to the road and appertaining thereto, shall be deemed a part of the road;" and that mortgages shall have the same effect, as to notice and otherwise, as to the personal and real property covered by them.<sup>1</sup>

These enactments not only recognize the local structure and body of the road as real property, but make the rolling stock and necessary movable appliances used in operating the road, adjuncts thereof, and parcel of the entirety of such realty—so far, at least, as regards the security of the mortgage indebtedness.<sup>2</sup>

Such mortgages, in Iowa, can only be enforced by proceedings in chancery; and after judgment and decree of foreclosure and order of sale, are to be satisfied by sale upon a species of special execution.<sup>3</sup> Such sale is subject to redemption, in Iowa, under the statute, if no appeal has been taken by the defendant, and no stay of execution has been had by him.

**8. Reorganization by purchasers.**—Inasmuch as the purchasers of a railroad, its property and proper franchises and values, do not thereby obtain the corporate entity, or clothe themselves with the corporate capacity of the debtor company, it becomes necessary for the purchasers to organize themselves into a new corporation, if they desire to operate and hold the road as such.<sup>4</sup> And such new corporation does not succeed to the liabilities of the former, for there is no privity between the old and the new corporation.<sup>5</sup> If, however, there be prior and paramount liens on the road, overriding that under which the purchase is made,

<sup>1</sup> Code of 1873, sec. 1285, p. 235.

<sup>2</sup> Code of 1873, sec. 2509, p. 429; sec. 3319, p. 531.

<sup>3</sup> Code of 1873, sec. 3012, p. 504. Such seems to be the doctrine in that state, if we regard railroad mortgages as mortgages of real property.

<sup>4</sup> *Commonwealth v. Tenth Mass. Turnpike Co.*, 5 Cush. (Mass.), 509; *Bruffett v. Great Western R. R. Co.*, 25 Ill. 353; *Atkinson v. Marietta & Cin. R. R. Co.*, 15 Ohio St. 21; *State v. Rives*, 5 Ired. (N. C.), Law, 297; *Metz v. Buffalo, Corry & Pittsburg R. R. Co.*, 58 N. Y. 61.

<sup>5</sup> *Sullivan v. Portland & Kennebec*

*R. R. Co.*, 4 Otto, 806, 16 Am. Ry. Rep. 181; *Comm. v. Central Passenger Ry. Co.*, 52 Penn. St. 506; *Stewart's Appeal*, 72 Penn. St. 291; *Vilas v. Milwaukee & Prairie du Chien Ry. Co.*, 17 Wis. 497; *Smith v. Chicago & N. Western Ry. Co.*, 18 Wis. 17. By statute, in Maine, such corporations are made subject to all existing laws, notwithstanding the original charter, and therefore can not claim immunity from taxation contrary to the existing laws, even though covered by the charter: *State v. Maine Central R. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323.

then the purchasers take the property with the burden of such liens resting upon it.<sup>1</sup>

By statute, in Alabama, the common law rule is changed, and the purchasers of a railroad are vested with all the rights and franchises of the company.<sup>2</sup>

Subscribers to stock in the reorganized road can not avail themselves of conditions in the charter of the original road. Thus, where the charter provided for *termini*, it was held that the reorganized road, purchasers under a mortgage sale, were under no obligation to complete the whole road, but only that portion mortgaged and sold to them; and such a subscriber could not avail himself of the failure to construct the road required by the charter, as a defense to his subscription.<sup>3</sup>

<sup>1</sup> *Morgan County v. Thomas*, 76 Ill. 120.

<sup>2</sup> *Meyer v. Johnston*, 53 Ala. 237, 15 Am. Ry. Rep. 467.

<sup>3</sup> *Chartiers Ry. Co. v. Hodgins*, 85 Penn. St. 501, 18 Am. Ry. Rep. 526. Where the purchasers take subject to all liabilities incurred by the receiver, they will be liable therefor; but the question of the receiver's liability for

an injury during his receivership, must first be settled by an action at law, before a bill can be filed against the purchaser: *Brown v. Wabash Ry. Co.*, 96 Ill. 297; S. C. 1 Am. & Eng. R. R. Cas. 625, 626. But see *Farmers' Loan & Trust Co. v. Cent. R. R. Co.*, 2 McCrary, 181; S. C. 7 Fed. Repr. 537, 1 Am. & Eng. R. R. Cas. 630.

## CHAPTER XLV.

### MANDAMUS

	Section.		Section.
To compel subscription to capital stock . . . . .	1	Against railroad company, to compel payment of taxes . . . .	6
To compel directors to collect capital stock . . . . .	2	Against city surveyor, to compel furnishing lines and levels for street railway . . . . .	7
To enforce services of the company other than on its own line . .	3	Against company, to compel completing and keeping up their works . . . . .	8
To enforce issuance of municipal bonds . . . . .	4	Against company, to compel various other acts . . . . .	9
To enforce the allowance of an appeal . . . . .	5		

**1. To compel subscription to capital stock.**—In some instances the writ of mandamus may be effectually invoked to compel subscription to capital stock; as where a commissioner's court, or other tribunal or authority, is required by law to subscribe to the capital stock of a corporation upon certain conditions and under certain circumstances legally provided for, and it becomes the duty of such authority to make the subscription on compliance with the necessary pre-requisites thereto, then the proceeding by mandamus will lie to compel the making of the subscription contemplated by the statute.<sup>1</sup>

Where, by law, a municipal corporation is allowed to raise money by a special tax to take stock in a railroad company, upon a favorable expression or decision of the persons owning real estate within the limits of such municipality, and the corporation is empowered, in such manner as it may think proper, to take the sense of such real estate owners in reference thereto, the law not only requires, by a fair interpretation, that the consent of a majority of such owners, *per capita*, should be obtained, but requires also

<sup>1</sup> *Ex parte Selma & Gulf R. R. Co.*, 46 Ala. 230; *Napa Valley R. R. Co. v. Supervisors*, 30 Cal. 435; *People v. Cass Co.*, 77 Ill. 438; *Ill. Midland Ry. Co. v. Barnett*, 85 Ill. 313. But see *Mt. Vernon v. Hovey*, 52 Ind. 563; *Jager v. Doherty*, 61 Ind. 528; *Bittinger v. Bell*, 65 Ind. 445; *Chicago, D. & M. R. R. Co. v. Olmstead*, 46 Ia. 316.

that the sense of each owner should be taken *per capita*, and in such manner as gives to all an equal right and opportunity to express their will. Therefore, an election to determine the question, at which each real estate owner is allowed one vote for the *pro rata* ownership of real estate to a certain amount in value—as, for instance, one vote for every hundred dollars worth of real estate owned by such persons respectively—is inoperative and void, and so is the tax levied in pursuance thereof. And this, too, though a majority of all the persons voting be in favor of the project, as well as a majority of the hundred dollars of assessed values. Such an arrangement is not only unequal in itself, but tends to deter small owners from voting at all.<sup>1</sup>

To maintain against a county a proceeding by mandamus to enforce the taking of capital stock in a railroad corporation, under a statute providing for the taking of such stock if approved by a vote of the voters of the county, the election for testing the question must be called in the manner and by the authority designated in the statute, and if otherwise brought about, the county authorities are not compellable by mandamus or otherwise to make the subscription. There must be at least a substantial, if not a strict and formal, compliance with the statute.<sup>2</sup>

And the repeal of a statute under which a subscription is made, and to enforce the provisions of which proceedings in mandamus are pending, defeats the proceedings, if no interests or rights are vested in the relator under such statute.<sup>3</sup> Therefore, where an act of assembly allowing county authorities to subscribe to capital stock of a railroad company is repealed during the pendency of mandamus proceedings instituted to

<sup>1</sup> City Council of Montgomery *v.* The State, *ex rel.* of Dickerson *et al.*, 38 Ala. 162.

<sup>2</sup> County Court of Fayette County *v.* The Lexington & Big Sandy R. R. Co., 17 B. Mon. 335.

<sup>3</sup> The Covington & Lexington R. R. Co. *v.* Kenton County Court, 12 B. Mon. 144, 152. The United States Circuit Courts have power to issue the writ of mandamus in suits pending before them, to compel local officers to levy and collect a tax for the payment

of municipal aid bonds on which a judgment has been recovered: Cass Co. *v.* Johnston, 95 U. S. 360; United States *v.* Clark Co., 96 U. S. 211; U. S. *v.* City of New Orleans, 98 U. S. 381; U. S. *v.* Badger, 6 Biss. 308; Sibley *v.* City of Mobile, 3 Woods, 535; Brodie *v.* McCabe, 33 Ark. 690. But the writ will not be issued to compel the doing of an act made unlawful by the state laws: Supervisors *v.* U. S., 18 Wall. 71; U. S. *v.* Clark Co., *supra*; U. S. *v.* Macon Co., 99 U. S. 582.

enforce or compel such subscription, the power to subscribe being thereby annulled, the mandamus proceedings are thereby defeated.<sup>1</sup>

**2. To compel directors to collect capital stock.**—When, by the terms of the charter, the time of calling in and enforcing payment of capital stock from stockholders is left to the discretion of the directory, a proceeding by mandamus will not lie to enforce their action in that respect.<sup>2</sup>

The relators in the case here cited were owners of paid-up stock, which they had paid for by a grant of the right of way for the road, and the substance of their complaint was that the value of their shares was diminished by failure to collect in the capital subscribed; but the court held that the time of collecting the same was a matter of discretion in the directors, and that, therefore, the proceeding would not lie. There were no allegations of fraud or abuse of trust.

**3. To enforce service of the company other than on its own line.**—To entitle the relators to the writ of mandamus, they must have either a common law, or else a statutory, right which they seek to enforce.<sup>3</sup>

An act of the legislature requiring a railroad corporation to perform duties as carriers beyond the terminus of its charter route or line, is in that respect unconstitutional and void;<sup>4</sup> therefore, a writ of mandamus will not be awarded to enforce the performance of such alleged duties.<sup>5</sup> It results from these legal conclusions that a railroad company can not be compelled, by proceedings of mandamus, to receive grain in bulk to be shipped over its road to an elevator or warehouse situate on a side track not owned or controlled by it, and at a point beyond the terminus of its line;<sup>6</sup> nor can a like proceeding be had to compel the company to procure the right to use such side track.<sup>7</sup> Nor does

<sup>1</sup> C. & L. R. R. Co. v. Kenton Co. Ct., *supra*.

<sup>2</sup> State of Louisiana, *ex rel.* Scully and others, v. Canal and Claiborne Streets R. R. Co., 23 La. An. 333.

<sup>3</sup> The People *ex rel.* v. Chicago & Alton R. R. Co., 55 Ill. 95.

<sup>4</sup> The People *ex rel.* v. Chicago & Alton R. R. Co., 55 Ill. 95.

<sup>5</sup> The People *ex rel.* v. Chicago &

Alton R. R. Co., 55 Ill. 95.

<sup>6</sup> The People, *ex rel.* Hempstead, v. Chicago & Alton R. R. Co., 55 Ill. 95; Chi. & N. W. Ry. Co. v. People, 56 Ill. 365.

<sup>7</sup> The People, *ex rel.* Hempstead, v. Chicago & Alton R. R. Co., 55 Ill. 95; Chi. & N. W. Ry. Co. v. People, 56 Ill. 365.

it alter the case or legal result that the railroad company has previously been used, on various occasions, 'to deliver freight cars at such elevator or warehouse. The company, acting in its corporate capacity, can not be compelled to perform acts outside the limits of its charter franchises.<sup>1</sup> Nor can they, at common law, be compelled to furnish, or to permit the erection of, side tracks, in connection with their road, extending to the business places or grain elevators of persons which exist off of their lines of road.<sup>2</sup> And if the right to such tracks and connection be asserted by virtue of an alleged custom to that effect among railroads of the vicinity, the custom must be clearly established, and must be shown to have been of such duration of time as to give it the force of law.<sup>3</sup>

4. **To enforce issuance of municipal bonds.**—To compel, by mandamus, a municipal corporation to issue to a railroad company bonds in payment for capital stock, there must not only be legal authority in the municipality to issue bonds for such purpose, but it must be made to appear that all the pre-requisites to the exercise of such authority have been complied with, and that the steps taken for such compliance have also been in conformity to the law on which the proceeding for issuing bonds is predicated.<sup>4</sup> It is not enough that the efforts to comply have been such, that if issued, the bonds will become valid under certain circumstances, as, for instance, in the hands of innocent holders; but a substantial and fair compliance must be shown with the spirit and the letter of the law. Therefore, notwithstanding the payment of county or other municipal bonds given to a railroad company in payment of a subscription to the capital stock of the company, will be enforced in favor of innocent holders of the bonds or coupons for value, to whom they come as negotiable instruments before maturity, although

<sup>1</sup>The People *ex rel.* v. Chicago & Alton R. R. Co., 55 Ill. 95.

<sup>2</sup>Vincent v. Chi. & Alton R. R. Co., 49 Ill. 33; The People, *ex rel.* of Spruance *et al.*, v. Chi. & N. W. Ry. Co., 57 Ill. 436.

<sup>3</sup>The People, *ex rel.* of Spruance *et al.*, v. Chi. & N. W. Ry. Co., 57 Ill. 436.

<sup>4</sup>County Court of Macoupin Co. v.

People *ex rel.*, 58 Ill. 191, 11 Am. Ry. Rep. 98; People *ex rel.* v. Chne, 63 Ill. 394, 7 Am. Ry. Rep. 373; People *ex rel.* v. Supvr., etc., of Oldtown, 88 Ill. 202, 21 Am. Ry. Rep. 297. The demand for the issuance of the bonds must be untrammelled by any condition that may make the refusal a qualified one: County Court, etc., v. People, *supra*.

the vote of the people required by law to authorize the issuing of the bonds has never been taken, or other irregularities and illegalities exist that would render the bonds void in the hands of the company itself, it, being as payee chargeable with notice thereof, yet the issuing of such bonds will not be enforced by mandamus, when any such illegalities or constitutional difficulties exist in reference to the subscription in satisfaction of which they are sought to be obtained.<sup>1</sup> Nor will a discretionary power of the county court, in respect to issuing, be controlled.<sup>2</sup>

5. To enforce the allowance of an appeal.—A mandamus will lie to enforce the allowance of an appeal from a judgment or order which is merely interlocutory, dissolving an injunction on bond, where the act enjoined, if consummated, will inflict upon the party prosecuting the injunction an irreparable injury.<sup>3</sup> And the injury is held to be irreparable, in a legal sense, in Louisiana, when it is such in its nature as can not be compensated for upon the final hearing of the injunction proceeding, but is of a character to involve a separate suit on the bond so given for the damages occasioned by the act complained of, and by dissolving the injunction, instead of being awarded in the original proceeding.<sup>4</sup> Thus, where the act inhibited is the pulling down of a railroad depot, and other constructions necessary to the operating of the road, and consequently will tend to a deprivation of the use of the franchise, the injury which would result therefrom is deemed in law irreparable, forasmuch as a remedy for the same, if wrongfully done, will only be obtainable by a

<sup>1</sup> *St. Joe & Denver City R. R. Co. v. Buchanan County Court*, 39 Mo. 485; *Leavenworth & Des Moines R. R. Co. v. County Court of Platte County*, 42 Mo. 171; *State, ex rel. B. & M. R. R. Co., v. Wapello County*, 13 Iowa, 388; *People ex rel. v. Cline, supra*. The tow ship in such case is not estopped by the acts of its officers in canvassing the votes, declaring the result, making the subscription, and issuing part of the bonds, from questioning the legality of the petition or vote. Perhaps otherwise where innocent holders are concerned: *People v. Cline, supra*.

<sup>2</sup> *St. Joe & Denver City R. R. Co. v. Buchanan County Court*, 39 Mo. 485.

<sup>3</sup> *The State, ex rel. Pontchartrain R. R. Co., v. The Judge of the Eighth District Court*, 23 La. An. 51.

<sup>4</sup> *Hyde v. Jenkins*, 6 La. 435; *Taylor v. Penrose*, 12 La. 137; *Gossett v. Cashell*, 14 La. 245; *Comstock v. Paie*, 15 La. 481; *The State v. The Judge of the Fifth District Court*, 12 La. An. 455; *White & Trufant v. Cazeneuve*, 14 La. An. 57; *The State, ex rel. Pontchartrain R. R. Co., v. The Judge of the Eighth District Court*, 23 La. An. 51.



separate suit on the bond. Therefore an appeal lies, and so also a mandamus to enforce it, from an order dissolving the injunction in such a cause.<sup>1</sup> And we may add that even then the injured party takes the risk of the parties to the bond proving responsible for any judgment recovered in such suit thereon.

**6. Against the railroad company, to compel payment of taxes.**

—Where a railroad or other private corporation has, by a resort to the judicial power, stayed or prevented the collection of taxes for which it is lawfully liable, until the ordinary remedy under the tax warrant or collector's authority has expired or become unavailable, and the decision of the court is that the company is liable for the taxes in question, and the case is such that a remedy by writ of execution may not be had, then a writ of mandamus lies against the company and officers to enforce the payment thereof.<sup>2</sup> The return to the writ of mandamus must show compliance to the extent of the defendant's ability.<sup>3</sup>

**7. Against city surveyor, to compel furnishing lines and levels for street railway.**—Where, by a grant of a right of way in the streets of a city, by a municipal corporation to a railroad company, it is provided that the city surveyor shall furnish the railroad company the requisite lines and levels for the building of the road, then if such officer refuse to perform that duty, a writ of mandamus lies to compel its performance.<sup>4</sup> And if in such case a part of the line has been built and used for a series of years, and the *bonus* agreed to be paid for the grant has been regularly paid by the company and accepted by the city, and ordinances have been passed recognizing the grant, then the city is estopped to deny the validity of the grant or right of the company to the use of the streets as contracted for. Such subsequent acts, and the acceptance of the *bonus* agreed on, amount to a ratification of the original grant.<sup>5</sup>

**8. Against the company, to compel completing and keeping up their works.**—Where a railroad corporation holds its charter

<sup>1</sup> The State, *ex rel.* Pontchartrain R. R. Co., *v.* The Judge of the Eighth District Court, 23 La. An. 51.

<sup>2</sup> Person, Collector, *v.* The Warren R. R. Co., 3 Vroom (N. J.), 441.

<sup>3</sup> Silverthorne *v.* The Warren R. R. Co., 4 Vroom (N. J.), 173, 177.

<sup>4</sup> The State, *ex rel.* St. Charles R. R. Co., *v.* Cockrem, adm'r, 25 La. An. 356.

<sup>5</sup> The State, *ex rel.* St. Charles R. R. Co., *v.* Cockrem, adm'r, 25 La. An. 356.

from the laws of the state under circumstances showing the grant of charter privileges to have been conferred or provided for in view of an advantage therefrom to the public and travel and commerce of the country, as a common carrier, it becomes a "public highway, to be used in a particular mode," and if taken up, or suffered to go into dilapidation or decay, a mandamus will be awarded to compel its restoration. There is an implied obligation resting on the company to carry out the object of the grant, and this may be enforced on it if it has the means. This, too, although liable to indictment: for the latter remedy is not effectual to restore the work, but only as a penalty for the neglect. Such is the ruling in England, and though this particular case was of a tram-railway, for user for toll by the public in their own vehicles, yet the principle laid down is broad enough for the covering of ordinary railways.<sup>1</sup>

So where, by act of parliament, railroad corporations were authorized to cross public highways, and to provide, by bridges, for such highways to pass over the railroads, and the act directed the manner thereof, on failure to comply with the requisites of the act in that respect, a mandamus was awarded to enforce a compli-

<sup>1</sup>The King *v.* The Severn & Wye Railway Company, 1 Eng. Railway & Canal Cases, 541; The Queen *v.* The Eastern Counties R. W. Company, 1 Eng. R. W. & C. Cases, 509; Blakemore *v.* The Glamorganshire Canal Nav., 1 Myl. & K. 162; Rex *v.* The Inhabitants of Cumberworth, 3 B. & Ad. 108; Lee *v.* Milner, 2 M. & W. 824; Atty. Genl. *v.* City of Boston, 123 Mass. 460. In Blakemore *v.* The Glamorganshire Canal Nav., Lord ELDON laid down the ground of such jurisdiction as follows: "I apprehend those who come for them [these acts] to parliament, do, in effect, undertake that they shall do and submit to whatever the legislature empowers and compels them to do; and that they shall do nothing else;—that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public,

as with reference to the interests of individuals." 1 Myl. & K. 162. The case above cited from 1 Eng. R. W. & Canal Cases, The Queen *v.* The Eastern Counties Railway Company, was an application for a mandamus to compel the railroad company to complete the building of its road as contemplated by its charter; and the writ was awarded, upon the general principle that the government will compel the recipient of such charter grants of privileges to do and perform what the grant contemplates as conducive to the public good, and is therefore considered as an inducement to the making of the grant. This rule is equally applicable, as we conceive, to corporations created under special enactments, or in virtue of provisions of a general incorporation law. In each case, alike, the corporate entity emanates from the government or state.

ance; and it was also held that the liability of the railroad corporation to indictment was no objection to the awarding of a mandamus.<sup>1</sup>

The railroad company has a discretion as to the manner of performing such work, but it is ministerial, and its ineffectual exercise renders it liable to mandamus.<sup>2</sup> If, in the restoration of a highway, the power of eminent domain must be exercised, such power is involved in the duty;<sup>3</sup> and if the railroad company be defeated in a proceeding to take the lands, this would be an answer to proceedings for contempt for not restoring the highway.<sup>4</sup> The court also has power to direct in what way, and by what means or alterations, the highway shall be restored.<sup>5</sup>

**9. Against railroad company, to compel various other acts.**—A charter provision directing that lands remaining unsold after a certain time from the completion of the road “shall be offered at public sale annually,” until disposed of, imposes the duty in too vague and general terms to entitle the people to a mandamus directing the company to so offer the lands.<sup>6</sup> The legislature should first prescribe the terms and manner of sale, etc., so as to render the duty plain and definite, and then it can be enforced by mandamus.<sup>7</sup>

Mandamus is also the proper remedy to compel the officers of a corporation to call a meeting for an election;<sup>8</sup> and to issue certificates of stock, and transfer shares;<sup>9</sup> but if there is a remedy by proper action, the writ will not be granted for the latter pur-

<sup>1</sup> *The Queen v. The Manchester & Leeds R. W. Co.*, 1 Eng. R. W. & C. Cases, 523. And see *People ex rel. v. Dutchess & Columbia R. R. Co.*, 58 N. Y. 152, 7 Am. Ry. Rep. 10, to the same effect.

<sup>2</sup> *People v. Dutchess & C. R. R. Co.*, *supra*.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *People v. Illinois Central R. R. Co.*, 62 Ill. 510, 6 Am. Ry. Rep. 201.

<sup>7</sup> *Ibid.*

<sup>8</sup> *People v. Albany Hospital*, 61 Barb. 397; *Owen v. Whitaker*, 5 C. E. Green, 122; *State v. Wright*, 10 Nev. 167.

<sup>9</sup> *Moses on Mandamus*, p. 108; *The King v. Worcester & B. Canal Nav.*, 1 Man. & Ry. 529; *Regina v. Liverpool, M. & N. Ry. Co.*, 16 Jur. 949; *S. C.* 11 Eng. L. & Eq. 408; *The Queen v. Shropshire Union Rys. & C. Co.*, Law Rep. 8 Q. B. 420; *Townsend v. McIver*, 2 S. Car. 25; *People v. Crockett*, 9 Cal. 112.

poses.<sup>1</sup> It may be granted to compel the restoration of a highway to its former state, when used by a railroad,<sup>2</sup> and to compel the working of the road.<sup>3</sup>

<sup>1</sup>*In re Fireman's Ins. Co.*, 6 Hill, 243; *Murray v. Stevens*, 110 Mass. 95; *Stackpole v. Seymour*, 127 Mass. 104; *State v. Rombauer*, 46 Mo. 155; *Birmingham Fire Ins. Co. v. Comm.*, 92 Penn St. 72; S. C. 9 Repr. 186; *Shropshire Union Rys. & C. Co. v. The Queen*, Law Rep. 7 H. L. 496; S. C. 8 Q. B. 420.

<sup>2</sup>*People v. Dutchess & C. R. R. Co.*, 58 N. Y. 152; *People v. N. Y. Cent. & H. R. R. R. Co.*, 74 N. Y. 302; *State v. Gorham*, 37 Me. 451; *People v. Chi. & Alton R. R. Co.*, 67 Ill. 118; *Indianapolis & Cin. R. R. Co. v. State*, 37 Ind. 489.

<sup>3</sup>*Atty. Genl. v. City of Boston*, 123 Mass. 460.

## CHAPTER XLVI.

### TRANSACTIONS AND CONTRACTS *ULTRA VIRES*.

	Section.		Section.
As against law and public policy	1	Rescission of, and relief from,	
As in excess of charter powers,		contracts <i>ultra vires</i>	4
and outside of charter purposes	2	Burden of proof	5
Application of the law of <i>ultra</i>		Ratification of contracts <i>ultra</i>	
<i>vires</i>	3	<i>vires</i>	6

**1. As against law and public policy.**—All transactions and contracts of a railroad corporation, or other corporate body, done or made in contravention of the law, or against the public policy, are *ultra vires*, and of no validity in the judicial tribunals of the country. They are incapable of being enforced.<sup>1</sup>

Thus rules, regulations or by-laws, contracts and obligations, made, entered into or assumed in restraint of trade, are *ultra vires*, as against the policy of the law; and so are all acts and undertakings of corporations which have for their object the contravention of the law, or evasion of corporate duties.<sup>2</sup> And so of contracts involving usurious interest, or the exaction of excessive rates or tolls, or stipulations for immunity, as common carrier, from liability for injuries resulting from the corpora-

<sup>1</sup> *Messenger et al. v. The Penn. R. R. Co.*, 36 N. J. (7 Vroom), 407; *S. C. 8 Vroom*, 531; *Sparrow v. Evansville & C. R. R. Co.*, 7 Ind. 369; *The Comrs. of Tippecanoe Co. v. The Lafayette, Muncie & Bloomington, R. R. Co.*, 50 Ind. 85; *S. C. 8 Am. R. W. Reps.* 324; *Pearce v. Madison & I. R. R. Co.*, 21 How. 441; *Pine Grove Township v. Talcott*, 19 Wall. 666; *Eidman v. Bowman*, 58 Ill. 444.

<sup>2</sup> *Peoria & Rock Isld. Ry. Co. v. The Coal Valley Mining Co.*, 68 Ill. 489, 2 Am. R. W. Reps. 295; *Middlesex R. R. Co. v. Boston & Chelsea R.*

*R. Co.*, 115 Mass. 347, 7 Am. Ry. Rep. 469; *Crocker v. Whitney*, 71 N. Y. 161; *Taylor v. Chichester & M. Ry. Co.*, Law Rep., 2 Exch. 356; *Riche v. Ashbury Ry. C. & I. Co.*, Law Rep., 9 Exch. 224; *Ashbury Ry. C. & I. Co. v. Riche*, L. R. 7 H. L. 653. In the case of *Middlesex R. R. Co. v. B. & C. R. R. Co.*, *supra*, it was held a horse railroad company had no power to make a contract to transfer the control of the road, with its franchises, receiving in return a fixed rent.

tion's own negligence or wrong, or that of its servants—not simply as for the violation of law, but as involving also an abuse of corporate powers, and, therefore, for both.<sup>1</sup> For corporate capacity does not confer power to violate the law; and as a sequence therefrom, whatever a corporation does outside of, or beyond, its corporate powers, is not only *ultra vires*, as beyond its authority to act, but is also in violation of the law of its existence. Though such acts may not amount to a punishable offense, yet they are unlawful; hence the English writers and jurists characterize them as such. So, likewise, as to acts done by the directory, or managing agents of the corporation, in violation of the rights of members—they, too, are unlawful; for such bodies are trustees for the members, and it is unlawful for trustees to violate or abuse their trust. And these latter acts are not only unlawful, but are also *ultra vires*, as beyond, or outside of, the authority of the actors to legally commit the same.<sup>2</sup>

We are therefore constrained to accord with the English authorities on this subject. The supposed cases put by the court in *Bissell v. The Mich. So. & Northern Indiana R. R. Co.*, 22 N. Y. 258, and the course of reasoning of the court, do not satisfy our mind as to the correctness of the assertion therein, that *ultra vires* acts are not necessarily illegal; for though it is true that a subscription by a private corporation, given outside of its corporate powers, for certain praise worthy purposes referred to in said case, though *ultra vires*, as wanting in authority, are not unlawful when acquiesced in by the members of the corporation, as between themselves, yet the fact is ignored that the corporate authorities are trustees for the creditors and persons dealing with the corporation, as well as for the mere members, and therefore have no right to divert the corporate funds to objects outside of the corporate purposes and enterprise, even though the stockholders consent thereto. And so, when such corporations are *quasi* public, being intended in law in some measure to accommodate the public, as, for instance, railroad corporations as common carriers—in these cases the managing board or directors are, *pro tanto*, trustees in like manner for the public, and

<sup>1</sup> *Pearce v. The Madison & Indianapolis R. R. Co.*, 21 How. 441.      <sup>2</sup> *Ibid.*

may not divert the corporate funds to, or engage in, outside transactions in violation of the charter. Hence it is that for such illegal action, though not criminally liable to punishment, yet the corporation is liable to be proceeded against by *quo warranto*, and to the forfeiture of its right to act as a corporation, if a private corporation, and if a municipal body, then there is a remedy for the abuse likewise, but that part of the subject is not within the limits of our treatise. We are greatly strengthened in this view of the question by the fact that the matters now treated of under the head of *ultra vires*, and attempted to be separated in their character from illegality, are all treated of by the great jurists, Bacon, Blackstone, Kent, Parsons, Redfield and Pierce, under the head of illegal contracts, or titles substantially such, and are characterized by these writers as illegal. Indeed, as we understand it, the case above cited of *Bissell v. The Michigan S. & N. Indiana R. R. Co.*, 22 N. Y. 258, only goes so far as to assert that such acts are not necessarily unlawful to the extent of involving moral turpitude, but may be illegal, however, as unauthorized by the charter and the law. The question more prominently involved in that case was the liability or non-liability of two roads for an injury incurred on a third one, jointly owned or controlled and operated by them. The court held them to a joint liability where the injury occurred from negligence, upon the same principles as if inflicted by, and the suit therefor was against, a single railroad corporation. The question of *ultra vires* had nothing really to do with the case: for whether they were acting lawfully or unlawfully, or within, or outside of and beyond, the scope of their corporate powers, still, for negligence and injuries resulting therefrom they were liable, if the injured party was not himself guilty of such negligence or want of care as would absolve them therefrom under the rules of law in regard to negligence.<sup>1</sup>

And though contracts with legislators to procure favorable legislation are illegal, as against public policy, and therefore are *ultra vires*, yet a contract of railroad projectors with a member of parliament or other legislative body before which the bill for a charter is pending, fixing the compensation to be paid such member as damages for going through his own land, in case the

<sup>1</sup>22 N. Y. 258.

road is built, is not illegal or *ultra vires*, forasmuch that members of parliament or other legislative bodies do not lose, by becoming such, their personal right of agreeing as to what compensation in damages shall be paid thereon, but remain in that respect, as are other persons, still capable of bargaining; and as a sequence, the projectors may bargain with them.<sup>1</sup>

An agreement by a railroad company, acting as a common carrier, to carry goods for a party at a fixed lower rate of transportation than for any other party, is void as against the policy of the law, and if violated by the company, no action will lie on such an agreement.<sup>2</sup>

And so a contract between two or more railroad companies, who are common carriers, that they or either of them shall not carry certain property for persons generally, which the law makes it their duty to carry, is *ultra vires*, and can not be enforced; and so would any contract of a common carrier be, obligating himself not to do what it is his duty to do.<sup>3</sup>

The corporation can make no valid contract in contravention of the law, or contrary to public policy. All such are *ultra vires*.<sup>4</sup> Nor can the board of directors make any valid contract in their own personal interest; nor one, without the consent of the stockholders, which materially changes the character of the road or corporate enterprise, as severing the line of the road, changing its terminus, or leasing or selling the road. To do either, the consent of the corporators is required.<sup>5</sup> Contracts made for all such purposes, by the directors, who are in fact but trustees, are in violation of their trust and duties, and are *ultra*

<sup>1</sup> Lord Howden *v. Simpson et al.*, 1 Eng. R. W. & C. Cases, 347.

<sup>2</sup> *Messenger and another v. The Penn. R. R. Co.*, 36 N. J. (7 Vroom), 407; S. C. 8 Id., 531; *Vincent v. Chi. & Alton R. R. Co.*, 49 Ill. 33; *Camblos v. Phil. & Reading R. R. Co.*, 4 Brewst. 563; *Cumberland Valley R. R. Co.'s appeal*, 62 Penn. St. 218.

<sup>3</sup> *Peoria & Rock Island Ry. Co. v. The Coal Valley Mining Company*, 68 Ill. 489, 2 Am. R. W. Reps. 295.

<sup>4</sup> *Board of Commissioners of Tippecanoe Co. v. Lafayette, Muncie & Bloomington R. R. Co. et al.*, 50 Ind. 85; S. C.

8 Am. R. R. Reps. 324, 353. But a contract by a railroad company to pay for procuring cattle to be shipped over its road is good, even though it is contemplated to ship a certain species at times prohibited by law: *Kansas Pacific Ry. Co. v. McCoy*, 8 Kans. 538, 5 Am. Ry. Rep. 239. Neither is it void because it provides for the use of money to influence legislation, unless the money is to be used improperly: *Ibid.*

<sup>5</sup> *Board of Commissioners v. Lafayette, Muncie & Bloomington R. R. Co. et al.*, 50 Ind. 85; S. C. 8 Am. R. W. Reps. 324, 353.



*vires* the corporation, and void. 'They bind no one.'<sup>1</sup> Nor can they change the general course or purpose of the road, or depart from the general purpose or design of the organization, without such consent.<sup>2</sup> If a contract be entered into for any such *ultra vires* purpose, a stockholder in the company so attempting to override the limit of the charter powers and purposes, may maintain a bill in equity to enjoin and inhibit the carrying the same into effect, and for the delivery up and cancellation of the written contract, if in writing.<sup>3</sup>

But if the alleged illegality be such as involves the question of disputed legal right, under an act of the parliament or legislature, equity will more properly require the question of legal right to be settled, when practicable, by a suit at law, and will stay proceedings until so settled.<sup>4</sup>

An agreement between two or more railroads to appropriate a named portion of their gross earnings to the payment of current expenses, and to divide the residue between them, is *ultra vires*, in the face of the New Hampshire statute entitled "An act to prevent railroad monopolies"; and a bill in equity lies to restrain such of the roads as are operating in New Hampshire from operating under and carrying out such illegal contract.<sup>5</sup> The fact that some of the roads were foreign corporations was held not to prevent the enforcement of the injunction against them, as they were operating in that state.<sup>6</sup>

A contract between a railway company and a telegraph company, whereby the telegraph company acquires the exclusive right of way of the railroad company for telegraphic purposes, so far as it legally might, and the railroad company agrees to discourage competition, is not contrary to public policy;<sup>7</sup> and if the railway company authorizes another telegraph company to

<sup>1</sup> Commissioners *v.* Lafayette, Muncie & Bloomington R. R. Co. *et al.*, 50 Ind. 85; S. C. 8 Am. R. W. Reps. 324, 355.

<sup>2</sup> Commissioners *v.* Lafayette, etc., R. R. Co. *et al.*, *supra*.

<sup>3</sup> The Commissioners *v.* The Lafayette, Muncie & Bloomington R. R. Co., 50 Ind. 85; S. C. 8 Am. R. W. Rep. 324; City of Memphis *v.* Dean, 8 Wall. 73.

<sup>4</sup> Sir John Simpson *et al.* *v.* Lord Howden, 1 Eng. R. W. & C. Cases, 326.

<sup>5</sup> Morrill *v.* Boston & Maine R. R. Co., 55 N. H. 531.

<sup>6</sup> Morrill *v.* Boston & Maine R. R. Co., 55 N. H. 531.

<sup>7</sup> Western Union Tel. Co. *v.* Chicago & Paducah R. R. Co., 86 Ill. 246, 17 Am. Ry. Rep. 407.

put up another line of wires upon the same poles, a court of equity will enjoin the completion of such a contract.<sup>1</sup>

Where a particular mode of exercising a power is prescribed by statute, as in the issuance of bonds, other modes are prohibited by implication;<sup>2</sup> and a transaction upon which a penalty is imposed is impliedly prohibited.<sup>3</sup>

**2. As in excess of charter powers, and outside of charter purposes.**—The corporate body and directory of a private corporation aggregate are trustees for the shareholders and others in interest (as, for instance, creditors of the corporation), for the carrying out and effecting the corporate purposes of the enterprise.<sup>4</sup> As such, it is their imperative duty to devote their own action and the corporate funds to the purposes of the organization and objects contemplated thereby.<sup>5</sup> A departure therefrom, as, for instance, the engaging in transactions and making of contracts outside of such purposes, is *ultra vires*, as in excess of the powers of the corporation; and therefore such transactions are void. They are in excess of the powers conferred by the state, as undertaking to do things or engage in transactions not authorized by the charter; as if a corporation organized and chartered for one purpose, diverts its powers and means to the prosecution or furtherance of a different object or purpose.<sup>6</sup> But where, by the charter, a railroad company is allowed to transport persons and property that pass over its road to still further points beyond its own terminus, it is not *ultra vires* for such company to own and operate a steamboat or boats used in carrying out such additional or further transportation.<sup>7</sup>

**3. Application of the law of *ultra vires*.**—In administering the law of *ultra vires*, as is well said by BIDDLE, J., in *The Board of Commissioners v. The Lafayette, Muncie & Bloomington R. R. Co.*,<sup>8</sup> "The right which justice seeks, and law endeavor-

<sup>1</sup> *W. U. Tel. Co. v. C. & P. R. R.* Repts. 324.  
Co., *supra*.

<sup>2</sup> *Kent Coast Ry. Co. v. London, C. & D. Ry. Co.*, L. R. 3 Ch. App. 656.

<sup>3</sup> *In re Cork & Youghal Ry. Co.*, Law Rep. 4 Ch. App. 748. *In re Natl. P. B. Bldg. Soc'y*, 5 *Id.* 309.

<sup>4</sup> *Comrs. of Tippecanoe Co. v. Lafayette, Muncie & Bloomington R. Co.*, 50 Ind. 85; S. C. 8 Am. R. W.

<sup>5</sup> *Bissell v. The Mich. S. & N. Indiana R. R. Co.*, 22 N. Y. 258.

<sup>6</sup> *Green's Brice's Ultra Vires*, 35; *Bissell v. Mich. S. & Northern Indiana R. R. Co.*, 22 N. Y. 258.

<sup>7</sup> *Shawmut Bank v. Plattsburgh & Montreal R. R. Co.*, 31 Vt. (2 Shaw) 491.

<sup>8</sup> 50 Ind. 85; S. C. 8 Am. R. W. Repts. 324.

ors to uphold," sometimes lie "in opposite directions, and must be sought by different ways. In one, the decisions protect right, and in the other they prevent wrong, and thus they are consistent. In both they are based on the fundamental principle in jurisprudence, that no one shall take advantage of his own wrong." Thus, when want of power to contract is relied on in favor of a corporation to defeat a recovery of the consideration for benefits received and enjoyed by it, the courts will go as far as the fixed rules of law will allow to sustain the contract, and thereby reach the justice, equity and good conscience of the case; but, on the other hand, where the want of power is relied on and pleaded against a corporation, then to prevent the perpetration of a wrong by it, the courts will hold such corporation to the strictest rules of law.<sup>1</sup>

4. **Rescission of, and relief from, ultra vires contracts.**—If a contract be not only *ultra vires*, but be also *malum in se*, or *malum prohibitum*, and is an executory contract, the courts will not enforce it, nor give compensation for a breach thereof;<sup>2</sup> and if the contract be an executed one, then neither party will be relieved therefrom, or be re-instated in their former condition, or be compelled to make restitution to the other, or be entitled to have indemnity or compensation for any loss or liability incurred or suffered by the execution thereof, or by reason of such contract; for as between persons *in pari delictu*, the law will not interfere, whether application therefor be to the law, or to the equity side of the courts.<sup>3</sup> But if the contract be simply *ultra*

<sup>1</sup> The Comrs. v. The Lafayette, Muncie & Bloomington R. R. Co., 50 Ind. 85; S. C. 8 Am. R. W. Reps. 324, 326.

<sup>2</sup> 2 Parsons on Contracts, 252, Sec. 12; 1 Parsons on Contracts, 380, Sec. 12; Armstrong v. Toler, 11 Wheat. 258; Bank of U. S. v. Owens, 2 Pet. 527; Kennett v. Chambers, 14 How. 38; Marshall v. Baltimore & Ohio R. Co., 16 How. 334; Cox v. Gould, 4 Blatch. C. C. Reps., 341; Scottish Northeastern R. W. Co. v. Stewart, 3 Macq. H. L. Cases, 382; Mayor and Council of Norwich v. The Norfolk R. W. Co., 30 Eng. Law and Eq. 120.

<sup>3</sup> Parsons on Contracts, Vol. 2, 252,

Sec. 12; Shiffner v. Gordon, 12 East, 304; Great Northern R. W. Co. v. The Eastern Counties R. W. Co., 12 Eng. L. & Eq. 224; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Kent v. Quicksilver Mining Co., 78 N. Y. 159; Franklin Co. v. Lewiston Sav. Bank, 68 Me. 43; Wheeler v. Russell, 17 Mass. 281; Morville v. Am. Tract Socy., 123 Mass. 129; National Pemberton Bank v. Porter, 125 Mass. 333; Attleborough Natl. Bank v. Rogers, 125 Mass. 339; Dimpfel v. Ohio & Miss. Ry. Co., 9 Biss. 127; S. C. 8 Repr. 641; Cent. Branch Union Pac. R. R. Co. v. W. U. Tel. Co., 1 Mc-

*vires*, and not open to the objection of *malum prohibitum*, or of *malum in se*, then, although relief will sometimes be given, under proper circumstances, yet whether the contract be executory merely, or be an executed one, to avoid performance if executory, and to rescind it, or treat it as a nullity, if executed, and have restitution, or recover back benefits which have flown from the one party to the other, then, if the party so seeking has itself received any consideration, benefit or valuable advantages therefrom; and in consideration or part consideration thereof, or as inducement thereto, it must on its part restore the same to the adverse party before relief can be had; and if it fail or be unable so to do, or the circumstances be such that the adverse party can not be made whole, or placed *in statu quo*, no relief will be given; for such actions or suits to recover for moneys or considerations paid on void contracts, or contracts sought to be rescinded, are, whether at law or in equity, in the nature of equitable actions, in so far that he who asks the equity must also do it.<sup>1</sup>

5. **Burden of proof.**—*Prima facie*, contracts and obligations of private corporations aggregate, as, for instance, railroad corporations, are valid, if nothing to the contrary be indicated or found upon their face. It will not be presumed that they are illegal or *ultra vires*. Proof thereof is required, which may consist of facts stated or recited in the contract itself, or by evidence *aliunde*;<sup>2</sup> and the burden of such proof is on the party set-

Crary, 551; S. C. 10 Repr. 417; Oil Creek & Allegheny River R. R. Co. v. Penn. Trans. Co., 83 Penn. St. 160; S. C. 16 Am. Ry. Rep. 322; Hays v. Galion G. L. & C. Co., 29 Ohio St. 330; Darst v. Gale, 83 Ill. 136; German Natl. Bank v. Meadowcroft, 95 Ill. 124; Paul v. City of Kenosha, 22 Wis. 266; Northwestern Union Packet Co. v. Shaw, 37 Wis. 655; Wapello Co. v. B. & M. R. R. Co., 44 Ia. 585; Thompson v. Lambert, *Id.* 239; Hitchcock v. City of Galveston, 96 U. S. 341; Gold Mining Co. v. Natl. Bank, *Id.* 640; Natl. Bank v. Matthews, 98 U. S. 621; Daniels v. Tearney, 102 U. S. 415; S. C. 11 Repr. 113.

<sup>1</sup> 2 Parsons on Contracts, 191; Hunt v. Silk, 5 East, 449; Norton v. Young, 3 Greenl. (Maine), 30; The Farmers Bank of Va. v. Groves, 12 How. 51; Murphy v. McVicker, 4 McLean, 252; Atlantic & Pacific Tel. Co. v. Union Pacific Ry. Co., 1 McCrary, 541; S. C. 1 Fed. Repr. 745, 21 Am. Ry. Rep. 256. See Cent. Branch Un. Pac. R. Co. v. W. U. Tel. Co., *supra*.

<sup>2</sup> Mitchell v. The Rome R. R. Co., 17 Geo. 574; Charleston & Jeffersonville Turnpike Co. v. Willey, 16 Ind. 34; Morris & Essex R. R. Co. v. The Sussex R. R. Co., 5 C. E. Green, 542; Chautauque Co. Bk. v. Risley, 19 N. Y. 369.

ting up, or relying on, the illegality or *ultra vires* character thereof.<sup>1</sup>

6. **Ratification of ultra vires contracts.**—A contract which is *ultra vires* originally, can not be ratified or confirmed by any subsequent act, bargain or undertaking of the same party. What a party can not make, it can not confirm; nor can a void act be made valid merely by the circumstance of its validity never having been brought in question or denied, whatever the length of time may be. A void act works no estoppel, when the invalidity is the result of an *ultra vires* taint.<sup>2</sup> But where the act done is merely in excess of the powers of an agent, and not of the principal, then the principal may ratify it, if the principal had power to have done that himself.<sup>3</sup> And ratification, when thus practicable, may be inferred from, or proven by, circumstances, against a railroad corporation, the same as in cases of natural persons.<sup>4</sup>

The subsequent recognition and action on the act of the president as valid by the directory of the company, is such a circumstance as will charge the company with a ratification thereof, if the act be not illegal in itself, and be such a one as the corporation had power to have made in the first place through its directory.<sup>5</sup>

<sup>1</sup> Chautauque Co. Bk. v. Risley, 19 N. Y. 369, and cases cited *ante*, p. 942, note 2; Ohio & Miss. Ry. Co. v. McCarthy, 96 U. S. 267; Ala. Gold Life Ins. Co. v. Cent. A. & M. Assn., 54 Ala. 73.

<sup>2</sup> Board of Comrs. of Tippecanoe Co. v. Lafayette, Muncie & Bloomington R. R. Co. *et al.*, 50 Ind. 85; S. C. 8 Am. R. W. Reps. 324; Ohio & Miss. R. R. Co. v. Ind. & Cin. R. R. Co., 5 Am. Law Reg. (N. S.), 733 (Superior Ct. of Cincinnati); Horn v. Mayor and Council of Balt., 30 Md. 218; Ashbury Ry. C. & I. Co. v. Riche, L. R. 7 H. L. 653; Chouteau v. Allen, 70 Mo. 290; Deaderick v. Wilson, 8 Baxt. 108.

<sup>3</sup> Darst v. Gale, 83 Ill. 136; Wood v. Whelen, 93 Ill. 153; The People v. Swift, 31 Cal. 26; Pixley v. Western

Pacif. R. R. Co., 33 Cal. 183; Dubuque Female Coll. v. The Township, etc., 13 Iowa, 555, 561; Bank of U. S. v. Dandridge, 12 Wheat. 83; Cozart v. Ga. R. R. & Bkg. Co., 54 Ga. 379; Riche v. Ashbury Ry. C. & I. Co., L. R. 9 Ex. 224; S. C., L. R. 7 H. L. 653; Kent v. Quicksilver Mining Co., 78 N. Y. 159. See Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43.

<sup>4</sup> Blen v. Bear River & Auburn W. & M. Co. 20 Cal. 602; Pixley v. Western Pacific R. R. Co., 33 Cal. 183; Bank of Columbia v. Patterson, 7 Cranch, 299; Bank of U. S. v. Dandridge, 12 Wheat. 83; Dubuque Female Coll. v. The Township, etc., 13 Iowa, 555, 561; Backman v. Charlestown, 42 N. H. 125.

<sup>5</sup> Pixley v. The Western Pacific R. R. Co., 33 Cal. 183.

Payments on an *ultra vires* contract are valid, where the appropriation of the payments to such object is made by the debtor.<sup>1</sup>

But though a contract to guarantee the bonds of another company be *ultra vires* when made, yet if the guarantor subsequently acquires the bonds, and re-issues them for a new and sufficient consideration, it will be a new act, and will be held valid.<sup>2</sup> And so far, at least, as a contract is executed, and its benefits received and retained by a corporation, it can not be repudiated as *ultra vires*.<sup>3</sup> *Quære*, however, as to future transactions under such a contract.<sup>4</sup>

<sup>1</sup> *Williamson v. New Jersey Southern R. R. Co.*, 28 N. J. Ch. 277, 14 Am. Ry. Rep. 34.

<sup>2</sup> *Arnot v. Erie Ry. Co.*, 67 N. Y. 315, 15 Am. Ry. Rep. 133.

<sup>3</sup> *Oil Creek & Allegheny River R. R. Co. v. Penn. Transp. Co.*, 83 Penn. St. 160, 16 Am. Ry. Rep. 322.

<sup>4</sup> *Oil Creek & A. R. R. Co. v. P. T. Co.*, *supra*.

## CHAPTER XLVII.

### RUNNING OF TRAINS.

	Section.		Section.
Company may run variety of trains to suit necessities . . .	1	Private trains on road of railroad corporation . . .	2

#### 1. Company may run variety of trains to suit necessities.

—A railroad company has a legal right to appropriate a portion of their trains exclusively to carrying freight, and other portions thereof exclusively to the carriage of passengers; and they are not required to carry passengers on their freight trains, or freight on their passenger trains, but may if they choose.<sup>1</sup>

Therefore, a ticket only confers on the holder a right to be carried according to the customs or regulations of the road in that respect.<sup>2</sup> He may, on such ticket, go to the place for which it calls on any train that usually carries passengers, and which stops at such place of destination; but is not entitled to a special train, or to go on one that does not stop at the place to which he is bound; nor if on such a one, to have it stop where it otherwise would not, for the purpose of letting him off.<sup>3</sup>

And so the like principle, as to refusing to take passengers thereon, applies to passenger trains as to stations at which such trains do not stop. They may lawfully refuse to take passengers for such stations; and if found aboard the same, without a previous agreement to stop at such stations, and without assurances that they would there be put off, they can not claim to be left at such stations in violation of the rules or custom of the road; nor can they claim to be carried past to some stopping place ahead, free of charge; and, therefore, the taking up of

<sup>1</sup>Chicago & Alton R. R. Co. v. Randolph, 53 Ill. 510; S. C. 5 Am. R. 60; Dunn v. Grand Trunk Ry. Co., 58 Maine, 187; S. C. 4 Am. R. 267; Cleveland, Columbus & Cincinnati R. Co. v. Bartram, 11 Ohio St. 457.

<sup>2</sup>Chicago & Alton R. R. Co. v. Ran-

dolph, 53 Ill. 510; Cleveland, Columbus & Cincinnati R. Co. v. Bartram, 11 Ohio St. 457.

<sup>3</sup>Chicago & Alton R. R. Co. v. Randolph, 53 Ill. 510; Pittsburg, Cincinnati & St. Louis Ry. Co. v. Nuzum, 50 Ind. 141, 9 Am. Ry. Rep. 396.

their tickets is no wrong of which they can complain;<sup>1</sup> and the conductor may exclude them from the train at the last stopping place before arriving at their intended destination, using no more force than is required for that purpose.<sup>2</sup>

A company may also run some of their trains, both passenger and freight, as through trains, stopping only at a portion of the stations, or principal ones, they, however, furnishing a reasonable number of other trains, stopping at all the stations, so as to afford reasonable accommodation to the traveling public.<sup>3</sup>

When one purchases a ticket, he should ascertain whether a train stops at his destined station before he gets upon it; and if he takes one not accustomed to stop at such place of destination, he is not, without an agreement to that effect, entitled to have the conductor or company change the order of business, and stop at such station for his accommodation.<sup>4</sup>

From the right to run some trains as freight trains, stopping only at certain ones of the stations for fuel and water, or other necessary purposes, it follows that the company may entirely exclude all passengers from such trains, or else only carry them to places whereat they are authorized or accustomed to stop.<sup>5</sup> Therefore, if a person takes such a train, without an agreement that it shall stop at an unauthorized or unusual place of stopping, he can not require the company to stop thereat, or change their course of business for his convenience; and in such a case the taking up of his ticket, without an agreement to stop at such place, will not give him a right to be put off at such place.<sup>6</sup> "In such a case, the passenger is in the wrong, and has no right to insist that he should be safely put off at the point he desires, or be carried through without charge."<sup>7</sup>

Though a railroad company is not bound to carry passengers

<sup>1</sup> *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510; *P., C. & St. L. Ry. Co. v. Nuzum*, *supra*.

<sup>2</sup> *State v. Goold*, 53 Maine, 279; *Dunn v. Grand Trunk Ry. Co.*, 58 Maine, 187; *Hilliard v. Goold*, 34 N. H. 230; *Fulton v. Grand Trunk R. R. Co.*, 17 Up. Can. Q. B. 428.

<sup>3</sup> *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510.

<sup>4</sup> *Chicago & Alton R. R. Co. v.*

*Randolph*, 53 Ill. 510; *P., C. & St. L. Ry. Co. v. Nuzum*, *supra*.

<sup>5</sup> *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510; *Cleveland, Columbus & Cincinnati R. R. Co. v. Bartram*, 11 Ohio St. 457.

<sup>6</sup> *Chi. & Alton R. R. Co. v. Randolph*, *supra*.

<sup>7</sup> *Chi. & Alton R. R. Co. v. Randolph*, *supra*, p. 516.



in their caboose car attached to a freight train, and may expel them therefrom, and by force if necessary, yet if they suffer them to remain, and receive therefor the usual fare, they will "be held justly responsible for negligence or want of care in their transportation."<sup>1</sup> But by entering on and taking passage in such freight train, the passenger takes upon himself the increased risk and diminution of comfort incident thereto; and if the same be managed with the care requisite for such a train, it is all those passing on it have a legal right to demand. The passenger can only expect such security as the mode of conveyance affords.<sup>2</sup>

**2. Private trains on road of railroad corporation.**—Private trains, running upon the road of a railroad corporation, come within the provisions of the law in relation to obstructing the crossings of public highways by railroad trains, and such private owner is alike liable under the statute as if the obstruction was caused by trains of the regular corporate owners of the railroad.<sup>3</sup>

<sup>1</sup> *Dunn v. The Grand Trunk Ry. Co.*, 58 Maine, 187; *Edgerton v. N. Y. & H. R. R. Co.*, 39 N. Y. (12 Tiff.), 229; *Carroll v. N. Y. & N. H. R. R. Co.*, 1 Duer, 578.

<sup>2</sup> *Galena & Chicago Union R. R. Co.*

*v. Fay*, 16 Ill. 568; *Chicago, B. & Q. R. R. Co. v. Hazzard*, 26 Ill. 373; *Dunn v. Grand Trunk Ry. Co.*, 58 Maine, 187.

<sup>3</sup> *Hall v. Brown*, 54 N. H. 496.

## CHAPTER XLVIII.

### COMMON CARRIERS OF PASSENGERS.

	Section.		Section.
Not insurers, but only bound to the highest degree of care . . . . .	1	passengers from ladies' car . . . . .	9
But not the highest degree of care which the human mind can attain to . . . . .	2	Through-ticket passengers bound to go directly through . . . . .	10
The degree of care required is not measured by the ability of the company . . . . .	3	Special carriers of passengers . . . . .	11
Not insurers of human life, nor liable for inevitable accident . . . . .	4	Free passengers . . . . .	12
Bound to carry all suitable persons who pay their fare . . . . .	5	May make regulations, and passengers must conform thereto . . . . .	13
May refuse to carry, and may expel, certain persons from cars . . . . .	6	Refusing to show ticket, passengers not paying may be expelled from the cars . . . . .	14
Accommodation and treatment of passengers . . . . .	7	Company may take increased fare, if paid on the cars . . . . .	15
May run some cars exclusively for ladies and gentlemen attendant . . . . .	8	Passengers taking wrong train . . . . .	16
For improper conduct may remove		Lay-over tickets . . . . .	17
		Carrying passengers on freight trains . . . . .	18
		A conductor's check is good only for the day on which it is given . . . . .	19
		Sleeping cars . . . . .	20

**1. Not insurers, but only bound to the highest degree of care.**—Although railroad corporations engaged in the transportation of passengers for hire or reward are in that respect common carriers, yet they are not insurers of the lives or persons of their passengers, but are merely bound to the exercise of the highest degree of care and diligence in the conduct of their business. They are accountable, however, for the slightest negligence, notwithstanding their exemptions from the rules pertaining to common carriers of property. Such are the general principles of law pervading the American authorities; and though there be occasionally slight deviations therefrom, yet the general ruling is in accordance with the doctrine here laid down.<sup>1</sup>

<sup>1</sup> 2 Kent's Coms., 2 ed. 600; Story on Bailments, sec. 498, 601, 601a; Cornwall v. Sullivan R. R. Co., 28 N. H. 161; Taylor v. The Grand Trunk Ry. Co., 48 N. H. 304; S. C. 2 Am. R. 229; The Philadelphia & Reading R. R.

Their duties and liabilities in this respect extend as well to the appliances used as to the manner of using them.

The rule in regard to safe road and appliances is not that the same shall be absolutely safe and perfect, but that the utmost skill, diligence and care in preparing them, and the best known means of testing their safety, shall be resorted to and used to render them so, and to detect and discover defects and insecurities.<sup>1</sup> Nor does it mean that cars, or other vehicles and appliances, shall be so constructed in regard to safety that passengers may not be able, by their own imprudence or thoughtlessness, to sub-

Co. v. Derby, 14 How. 486; Steamboat New World v. King, 16 How. 474; Boyce v. Anderson, 2 Pet. 150; Stokes v. Saltonstall, 13 Pet. 181; Pennsylvania Co. v. Roy, 102 U. S. 451; S. C. 1 Am. & Eng. R. R. Cas. 225; Hall v. Conn. River Steamboat Co., 13 Conn. 319; Fuller v. Naugatuck R. R. Co., 21 Conn. 557, 576; Ingalls v. Bills, 9 Met. 1; McElroy and wife v. Nashua & Lowell R. R. Co., 4 Cush. 400; Camden & Amboy R. R. & T. Co. v. Burke, 13 Wend. 626; Hegeman v. Western R. R. Co., 3 Kern. (13 N. Y.), 9; Noltton v. The Western R. R. Co., 15 N. Y. 444, 446; Bowen v. N. York Cent. R. R. Co., 18 N. Y. 408; Brown v. The New York Cent. R. R. Co., 34 N. Y. (7 Tiffany), 404; Maverick and wife v. Eighth Avenue R. R. Co., 36 N. Y. 378; Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 7 Am. Ry. Rep. 25; New Jersey R. R. Co. v. Kennard, 21 Penn. St. 203; Penn. R. R. Co. v. Aspell, 23 Penn. St. 147; Sullivan v. Phila. & Reading R. R. Co., 30 Penn. St. 234; Meier v. Penn. R. R. Co., 64 Penn. St. 225; Galena & Chi. Union R. R. Co. v. Yarwood, 15 Ill. 468; Galena & Chi. Union R. R. Co. v. Fay, 16 Ill. 558; Chicago, Burlington & Quincy R. R. Co. v. George, 19 Ill. 510; Toledo, Wabash & Western Ry. Co. v. Apperson, 49 Ill. 480; Pittsburg, Cin. & St. Louis Ry. Co. v. Thompson, 56 Ill. 138; Wheaton v. The North

Beach & Mission R. R. Co., 36 Cal. 590; Union Pacific Ry. Co. v. Hand, 7 Kansas, 380, 392; Jeffersonville R. R. Co. v. Hendricks, 26 Ind. 228; Johnson and wife v. The Winona & St. Peter R. R. Co., 11 Minn. 296; Virginia Central R. R. Co. v. Sanger, 15 Gratt. 230; Baltimore & Ohio R. R. Co. v. Wightman, 29 Gratt. 431, 17 Am. Ry. Rep. 351; Balt. & O. R. R. Co. v. State, 29 Md. 252; Kansas Pacific Ry. Co. v. Miller, 2 Col. 442, 20 Am. Ry. Rep. 245; George v. St. Louis, Iron Mountain & Southern Ry. Co., 34 Ark. 613; S. C. 1 Am. & Eng. R. R. Cas. 294; Holmes v. Oregon & Cal. Ry. Co., 6 Sawyer, 262; S. C. 5 Fed. Repr. 528, 1 Am. & Eng. R. R. Cas. 623. And a railroad company owes a higher degree of care to its passengers than to mere strangers: Jeffersonville, Madison & Indianapolis R. R. Co. v. Riley, 39 Ind. 568, 10 Am. Ry. Rep. 325; Central R. R. & Banking Co. v. Perry, 58 Ga. 461, 16 Am. Ry. Rep. 122.

<sup>1</sup> Cumberland Valley R. R. Co. v. Hughes, 11 Penn. St. (1 Jones), 141; Meier v. Penn. R. R. Co., 64 Penn. St. 225; Muldowney v. Ill. Cent. Ry. Co., 36 Iowa, 462; Virginia Central R. R. Co. v. Sanger, 15 Gratt. 230; Balt. & O. R. R. Co. v. State, 29 Md. 252; George v. St. Louis, Iron Mountain & Southern Ry. Co., 34 Ark. 613; S. C. 1 Am. & Eng. R. R. Cas. 294. To

ject themselves to injury by acts of willfulness or carelessness on their part, entirely unnecessary to the comforts of transit, as has in some cases been held—as, for instance, where a passenger placed his arm out of the window of a moving car, and received an injury thereto, and was held entitled to recover on account of the injury thus received.<sup>1</sup> This, the only case of the kind that we remember, has been repudiated and overruled by subsequent decisions, and the contrary of the principles thereby asserted is well settled by authority.<sup>2</sup> It were to our mind as reasonable to hold that doors are dangerous, and therefore negligently constructed, when so arranged that passengers may go out thereat during transit, and receive injuries on the platform, or by leaping or falling off the train, as to assert such a rule in regard to windows. The passengers have no longer the ordinary claims to immunity from injury when outside of either, unless such injury be wantonly inflicted by the company or its employes. Their place is not only inside the car, but in their seats.<sup>3</sup>

The company is under an implied obligation to have a safe road, with proper engines and coaches; to employ persons of competent knowledge and skill, and of sober habits, to conduct their business and operate their trains;\* and are bound to use the utmost

encumber the track with construction materials and operations where trains are passing, is culpable negligence: *Virginia Central R. R. Co. v. Sanger*, *supra*. But although a railroad company is bound to bring to its aid in the construction of its works proper and competent engineering skill and knowledge, yet if it has done so, and injury arise from floods or other unexpected visitations, whose comings are not foreshadowed or indicated by the ordinary and usual course of nature, but are to be regarded as providential visitations, the company is not liable for such injury: *Pittsburg, Ft. Wayne & Chi. Ry. Co. v. Gilleland*, 56 Penn. St. 445.

<sup>1</sup> *New Jersey R. R. Co. v. Kennard*, 9 Harris (21 Penn. St.), 204; *George v. St. L., I. M. & S. Ry. Co.*, *supra*.

<sup>2</sup> *Laing v. Colder*, 8 Barr (8 Penn.

St.), 482; *Sullivan v. Phil. & Reading R. R. Co.*, 30 Penn. St. (6 Casey), 234; *Penn. R. R. Co. v. Zebe and wife*, 33 Penn. St. (9 Casey), 318; *Pittsburg & Connellsville R. R. Co. v. McClurg*, 6 P. F. Smith (56 Penn. St.), 294; *Todd v. Old Colony & F. R. R. Co.*, 3 Allen, 21; *Holbrook v. Utica & Sch. R. R. Co.*, 12 N. Y. 236.

<sup>3</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294.

<sup>4</sup> *McElroy v. Nashua & Lowell R. R. Co.*, 4 Cush. 400, 1 Am. R. W. Cas. 591, 593; *McDonald v. The Chicago & Northwestern R. R. Co.*, 26 Iowa, 124, 142; *Camden & Amboy R. R. and Trans. Co. v. Burke*, 13 Wend. 611; *Laing v. Colder and another*, 8 Penn. St. R. 479; S. C. 2 Am. R. W. Cas. 378; *Meier v. Penn. R. R. Co.*, 64 Penn. St. 225. In the latter case it is laid down as law that

care and diligence for the comfort and safety of their passengers, not only in the management of their trains and cars, but likewise in all their subsidiary arrangements.<sup>1</sup> They are under a like obligation or duty "to provide reasonable accommodations at stations for the passengers who are invited and expected to travel on their roads;"<sup>2</sup> and "are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds reasonably near to the platforms, where passengers or those who have purchased tickets with a view to take passage on their cars, would naturally or ordinarily be likely to go."<sup>3</sup> For injuries occasioned to passengers by the violation of, or omission to perform, any of these duties, as well as for injuries arising from the negligence, unskillfulness or unskillful management or conduct of their agents, servants and employes in the course of their employment, the company are liable, unless the injured party, by some misconduct or negligence on his part, also contribute to the injury or the cause thereof, and provided the injured party himself observed ordinary care to avoid injury.

In the case of *Pittsburg & Connellsville Railroad Company v. McClurg* (*supra*), the court below ruled in accordance with *New Jersey Railroad Company v. Kennard*, 9 Harris (21 Penn. St.), 203, "that negligence is not to be inferred, when injury accrues from an exposure of an elbow or an arm out of a car window, while the train is moving, if it be not willfully done." But reversing the judgment below, the Supreme Court of Pennsylvania, THOMPSON, C. J., say: "This can not be maintained on any reasonable principle, we think. When a passenger on a railroad purchases his ticket it entitles him to a seat in the cars. In the seat,

railroads must, in respect to provision for the safety of their passengers, keep pace with science, art and modern improvement in their application to the carriage of passengers, but are not responsible for the unknown as well as the new.

<sup>1</sup> *McElroy v. Nashua & Lowell R. R. Co.*, 4 Cush. 400, 1 Am. R. W. Cas. 591; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49; *Ingalls v. Bills*, 9 Met. 1; *Laing v. Colder* and another, 8 Penn. St. R. 478;

*Camden & Amboy R. R. & Trans. Co. v. Burke*, 13 Wend. 611; *Chi. & Alton R. R. Co. v. Wilson*, 63 Ill. 167.

<sup>2</sup> *McDonald v. Chicago & Northwestern R. R. Co.*, 26 Iowa, 124, 139; *Memphis & Charleston R. R. Co. v. Whitfield*, 44 Miss. 466; S. C. 7 Am. R. 699; *Knight v. Portland, Saco & Portsmouth R. R. Co.*, 56 Maine, 234.

<sup>3</sup> *McDonald v. The Chicago & Northwestern R. R. Co.*, 26 Iowa, 124, 145.

no part of his body is exposed to obstacles outside of the car. He is secure there, ordinarily, from any contact with them. Where he is thus provided with a seat, safe and secure in the absence of accident to the train, and the carrier has a safe and convenient car, well conducted and skillfully managed, his duty is performed towards the passenger. The duty of the latter on entering arises, namely, that he will conform to all the reasonable rules and regulations of the company for occupying, using and leaving the cars; and, after doing so, if injury befall him by the negligence of the carriers, they must answer; if he do not so conform, but is guilty of negligence therein, and is injured, although there may be negligence on the part of the carriers, their servants and agents, he can not recover: *Sullivan v. Read. Railroad Co.*, 6 Casey, 234; *The Penna. Railroad Co. v. Zebe and wife*, 9 *Id.*, 318.”<sup>1</sup> In the same case the court say: “A passenger, on entering a railroad car, is to be presumed to know the use of a seat, and the use of a window; that the former is to sit in, and the latter is to admit light and air. Each has its separate use. The seat he may occupy in any way most comfortable to himself. The window he has a right to enjoy—but not to occupy. Its use is for the benefit of all, not for the comfort alone of him who has by accident got nearest to it. If, therefore, he sit with his elbow in it, he does so without authority; and if he allow it to protrude out, and is injured, is this due care on his part? He was not put there by the carrier, nor invited to go there; nor misled in regard to the fact that it is not a part of his seat, nor that its purposes were not exclusively to admit light and air for the benefit of all. His position is, therefore, without authority. His negligence consists in putting his limbs where they ought not to be, and liable to be broken without his ability to know whether there is danger or not approaching. In a case, therefore, where the injury stands confessed, or is proved to have resulted from the position voluntarily or thoughtlessly taken, in a window, by contact with outside obstacles or forces, it can not be otherwise characterized than as negligence, and so to be pronounced by the court. This is undoubtedly the rule in Massachusetts: *Todd v. The Old Colony Railroad Co.*, 3 Allen, 21, and again in 7 Allen, 207.”<sup>2</sup> The same principle is asserted in

<sup>1</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 296, 297.

<sup>2</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 297, 298.

Penn. R. R. Co. *v.* Zebe and wife (*supra*), where the suit was for damages on account of an injury received in leaving the cars. The injured party got off on the wrong side, and was there struck by a passing train. It was held to be negligence *in se* to thus leave the car, and that in the absence of circumstances requiring it, the court below had erred in not charging it to have been negligence in law.

The court in that case say: "It was not negligence on the part of the company that they did not by force or barriers prevent the parties from leaving at the wrong side. People are not to be treated as cattle; they are to be presumed to act reasonably in all given contingencies, and the company had no reason to expect anything else in this case."<sup>1</sup> Thus the case of *The New Jersey R. R. Co. v. Kennard* is no longer authority.

The case cited from 13 New York, of *Hegeman v. The Western Railroad Company*, was for an injury to a passenger occasioned by the breaking of an axle of one of the cars, owing to an alleged latent defect in the iron thereof, which could not be discovered from external appearances. It was contended by the plaintiff at the trial, that external examination was not sufficient, nor was the good reputation of the manufacturers, to exonerate the defendant, if there were other known means or tests, used by others, of detecting such internal defect, and these means were not resorted to. The court held that such is the law; and that the existence thereof, and also the question as to whether resorted to by defendant, and whether the breakage and injury resulted from such defect, were questions for the jury to decide. The court say, GARDINER, C. J.: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars, in the prosecution of their business. This also must be conceded. What the law does require is, that they shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case, they engage that all that well directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder

<sup>1</sup> Penn. R. R. Co. *v.* Zebe and wife, 33 Penn. St. (9 Casey), 318.

is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance.”<sup>1</sup>

That court in the same case, in further illustration of the rule, say: “It is perfectly understood that latent defects may exist undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove, and the jury have found, that a simple test (that of bending the iron after the axle was formed and before it was connected with the wheel) existed, by which it could be detected. This should have been known and applied by men “possessing skill in that particular business.” It was not known, or if known, was not applied by these manufacturers. It was not used by the defendant, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held and I think correctly, that they were liable.”<sup>2</sup>

The terms here used, however, by the learned judge, “that they (the company) shall furnish a sufficient car to secure the safety of their passengers, by the exercise of the utmost care and skill in its preparation,” is not to be understood as meaning that the care must, at all events, be actually sufficient to that purpose, but that it must be as much so as it can be made to be by the exercise of the utmost care and skill in its preparation; that if there be known tests for the detection of secret defects, they must be used, or else liability will result from omission to do so, whether such omission be that of the company, or of the manufacturers from whom the vehicle is procured; and that even

<sup>1</sup> 13 N. Y. 26. And to the same point, see *Sullivan v. The Phila. & Reading R. R. Co.*, 30 Penn. St. (6 Casey), 234; *Carroll v. Staten Island*

*R. R. Co.*, 58 N. Y. 126, 7 Am. Ry. Rep. 25.

<sup>2</sup> 13 N. Y. 26, 27.



the good name of the latter may not alone be relied on by the company for the sufficiency of the machinery.

**2. But not to the highest degree of care which the human mind can attain to.**—But this rule of greatest possible care is not to be understood as requiring the utmost degree of care which the human mind can attain to, or is capable of inventing. Such application of it would involve such an expenditure as would tend to prevent all persons of ordinary prudence from engaging in the business. It simply means the greatest degree of care that is consistent with that particular mode of transportation. It does not contemplate such a measure of care as will render it practically impossible to continue the railroad transportation of passengers.<sup>1</sup>

The rule that railroad companies are bound to furnish safe materials and structures, and must keep them in repair, extends as well to bridges of the company as to any other part of the road and its appurtenances.<sup>2</sup> To effect this they must do all that human foresight, care and vigilance can reasonably do, consistent with the mode of conveyance and practical operation of their roads—must put them in that condition, and keep them so. This is due as well to the public as to the servants of the company; and the latter, entering into the service of the company, and the public, entering on the road as passengers, have a right to presume that this has been done.<sup>3</sup>

They must employ competent, skillful, prudent and sober men, and see that all things are in proper repair and safe condition, and provide proper appliances, well constructed by skillful workmen, and subject the same to proper tests from time to time, more especially bridges;<sup>4</sup> but having done so, then they are by no means insurers of human life, and are not accountable

<sup>1</sup> *Taylor v. The Grand Trunk Ry. Co.*, 43 N. H. 304; S. C. 2 Am. R. 229; *Tuller v. Talbot*, 23 Ill. 357; *Meier v. Penn. R. R. Co.*, 64 Penn. St. 225.

<sup>2</sup> *Toledo, Peoria & Warsaw Ry. Co. v. Conroy*, 68 Ill. 560; *Chi. & N. W. Ry. Co. v. Taylor et al.*, adm'r, 69 Ill. 461.

<sup>3</sup> *Toledo, Peoria & Warsaw Ry. Co. v. Conroy*, 68 Ill. 560; *Chi. & N. W. Ry. Co. v. Taylor et al.*, adm'r, 69 Ill.

461. But deficient appliances will not be a ground of recovery by an employe for injury resulting from his own rashness, by which he materially contributes to the accident, as, for instance, running an engine at a reckless rate of speed: *Ill. Cent. R. R. Co. v. Patterson*, 69 Ill. 650.

<sup>4</sup> *Toledo, Peoria and Warsaw Ry. Co. v. Conroy*, 68 Ill. 560.

for the result of latent defects which the usual and well recognized tests of science and art fail to detect. Nor are they liable for accidents which skill and experience are unable to foresee and avoid.<sup>1</sup>

The contract for transportation of a passenger implies on his part compliance with all the reasonable rules and regulations for entering, occupying and leaving the cars. If injury occurs to him by reason of his disregard thereof, the company are not liable in damages, although its servants by negligence contributed to causing the injury.<sup>2</sup> On the part of the company, the contract implies that it is provided with staunch and road-worthy cars, and a safe and sufficient railroad—that is, as much so as the utmost foresight and care can make them; that proper means have been taken beforehand to guard against every apparent danger; and that the servants in charge are sober and competent men.<sup>3</sup> And if in the performance of such contract a passenger be injured, without his own fault, the law raises, *prima facie*, the presumption of negligence against the company, and throws upon it the *onus* of showing that it did not exist.<sup>4</sup> This legal presumption is repelled by proving that the injury resulted from inevitable accident, or the act of God, or that it proceeded from something against which human foresight and prudence could not provide;<sup>5</sup> but whatever these can do for the safety of the passenger, the law requires the company transporting him to do.<sup>6</sup>

**3. The degree of care required is not to be measured by the ability of the company.**—The standard of care and diligence, however, is not dependent upon the pecuniary ability of the particular road or roads involved, from time to time, in the question of its just exercise, but is a standard alike for all, irrespective of their pecuniary condition; and an instruction to the jury making the degree of care required dependent on the means of the road involved in the action will be error. Such a rule would cause the

<sup>1</sup> Toledo, Peoria & Warsaw Ry. Co. v. Conroy, 68 Ill. 560.

<sup>2</sup> Sullivan v. The Phila. & Reading R. R. Co., 30 Penn. St. (6 Casey), 234.

<sup>3</sup> Sullivan v. The Phila. & Reading R. R. Co., 30 Penn. St. (6 Casey), 234.

<sup>4</sup> Sullivan v. The Phila. & Reading R. R. Co., 30 Penn. St. 234.

<sup>5</sup> Sullivan v. The Phila. & Reading R. R. Co., 30 Penn. St. (6 Casey), 234.

<sup>6</sup> Sullivan v. The Phila. & Reading R. R. Co., 30 Penn. St. (6 Casey), 234.

measure of care and diligence required to fluctuate with the pecuniary ability or changes in the revenue of roads. Therefore a charge that "defendants must use such degree of care as is practicable, short of incurring an expense which would render it altogether impossible to continue the business," is error, for which judgment will be reversed.<sup>1</sup>

**4. Not insurers of human life, nor liable for inevitable accident.**—Railroad companies are not insurers of the lives or persons of passengers, nor liable for injuries occasioned to them by inevitable accident. The principles governing common carriers of goods do not apply to the carriage of passengers. The matter of mere accident is a risk that the traveler himself necessarily assumes.<sup>2</sup> By the term mere accident, we necessarily mean an inevitable occurrence, not to be foreseen and prevented by vigilance, care and attention, and not occasioned or contributed to, in any manner, by the act or omission of the company, its agents, employees or servants.<sup>3</sup>

**5. They are bound to carry all suitable persons who pay.**—As common carriers of persons, railroad companies are ordinarily bound to carry, according to their reasonable rules and regulations, and in accordance with their regular time cards, all per-

<sup>1</sup> *Taylor v. Grand Trunk R. R. Co.*, 48 N. H. 304.

<sup>2</sup> *Camden & Amboy R. R. & Transportation Co. v. Burke*, 13 Wend. 611; S. C. 2 Am. R. W. Cas. 399; *McPadden v. The New York Cent. R. R. Co.*, 44 N. Y. 478; S. C. 4 Am. R. 705; *Cleveland, Painesville & Ashtabula R. R. Co. v. Curran*, 19 Ohio St. 1; S. C. 2 Am. R. 362, 365; *Angell on Carriers*, secs. 521, 522; *Laing v. Colder and another*, 8 Penn. St. 479; S. C. 2 Am. R. W. Cas. 378; *Meier v. The Penn. R. R. Co.*, 64 Penn. St. 225; *Boyce v. Anderson*, 2 Pet. 150; 2 Kent, 600 (2d ed.); *Knight v. The Portland, Saco & Portsmouth R. R. Co.*, 56 Maine, 234; *Sawyer and others v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 240; *Huelsenkamp v. Citizens' R. W. Co.*, 37 Mo. 537; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228; Kan-

*sas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245; *Atchison & Neb. R. R. Co. v. Flinn*, 24 Kans. 627; S. C. 1 Am. & Eng. R. R. Cas. 240. A contrary doctrine is holden in some cases, as in *Alden v. The New York Cent. R. R. Co.*, 26 N. Y. 102, where it is said the company is absolutely bound to provide road-worthy vehicles, or bound to absolute perfection therein, and was therefore liable for an injury occasioned by a crack in the axle of the car, although the defect could not have been discovered by any practicable mode of examining the same; but such is not the current of authorities, either in England or America: *McPadden v. N. Y. Cent. R. R. Co.*, 44 N. Y. 478.

<sup>3</sup> *Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126, 7 Am. Ry. Rep. 25.

sons who apply to be carried, and are ready to pay, and do pay, the usual fare when required, on such of their ordinary passenger trains as are used to stop at the stations to which such persons are bound<sup>1</sup>—except persons of such unsuitable condition, character, conduct, habits or purpose, hereinafter mentioned, as may excuse the company from receiving or retaining them in their cars, or may make it a duty to other passengers to expel them therefrom.

The holder of an ordinary passenger ticket for passage on a railroad to a given place, with nothing on such ticket limiting its use to any particular train or trains, is entitled to a passage by virtue thereof on any regular train of the company upon such road which is bound for the place of destination mentioned on the ticket, notwithstanding a regulation of the company, which is unknown to such holder of the ticket, confining its use to a particular portion of the trains passing over the road. Thus, where a portion of the daily trains of a company connected, at the place of railroad terminations, with packet lines of water transportation of the company, by close connection, to a point still beyond, and by a regulation of the company passengers bound for such last mentioned point were required to travel on the trains thus connecting with the boats, the purchaser of a ticket to such point may not be forced to wait for and proceed upon a train making such connection, if he buys the ticket without knowledge of the company's regulation in that respect, and no indication thereof is to be found upon the ticket.<sup>2</sup>

**6. They may refuse to carry certain persons, or may expel them from the cars.**—Railroad companies, as carriers of persons, are not bound to receive for carriage, or to carry, persons whose purpose whilst traveling on the cars is to interfere with or injure the business and lawful profits of the company;<sup>3</sup> nor persons who are of known and notoriously bad, or even justly suspicious, character;<sup>4</sup> or persons offensively gross and immoral in their

<sup>1</sup> Angell on Law of Carriers, secs. 524, 525; *Beekman v. The Saratoga & Schenectady R. R. Co.*, 3 Paige, 45; *S. C. 2 Am. R. W. Cas.* 503; *Cheney v. The Boston & Maine R. R. Co.*, 11 Met. 121; *West Chester & Philadelphia R. R. Co. v. Miles*, 55 Penn. St. 209; *Coger v. Northwestern Union*

*Packet Co.*, 87 Ia. 145, 8 Am. Ry. Rep. 101.

<sup>2</sup> *Maroney v. Old Colony & Newport Ry. Co.*, 106 Mass. 153.

<sup>3</sup> *Jencks v. Coleman*, 2 Sumn. C. C. R. 221.

<sup>4</sup> *Jencks v. Coleman*, 2 Sumn. C. C. R. 221.

conduct, habits or behavior; nor so intoxicated as to be offensive;<sup>1</sup> nor such as will not conform to the reasonable rules and regulations of the company in respect to the carriage of passengers, they being informed thereof, or otherwise having knowledge of the same;<sup>2</sup> nor such as refuse to pay their fare, or to procure tickets before entering the train.<sup>3</sup> Moreover, such objectionable persons, for the objections aforesaid, may not only be refused admission into the cars of the company, if their objectionable conduct, purpose, character or intention be known previous to such admission, but having been received thereon, may be expelled therefrom on rendering themselves openly obnoxious to any of said objections; the officer in charge using no more force or offensiveness than becomes necessary to effect such expulsion.<sup>4</sup>

<sup>1</sup> *Jencks v. Coleman*, 2 Sumn. C. C. R., 221; *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Vandyne*, 57 Ind. 576, 18 Am. Ry. Rep. 454. But if the intoxication be but slight, not affecting the conduct of the passenger, the railroad company will not be justified in refusing to receive and carry him: *P., C. & St. L. Ry. Co. v. Vandyne*, *supra*. And see *Brown v. Memphis & Charleston Ry. Co.*, 1 Am. & Eng. R. R. Cas. 247 (U. S. Cir. Ct. Westn. Dist. Tenn., Apr. 25, 1881), limiting the general language of *Jencks v. Coleman*, *supra*. In this case it is said that although a female passenger, whose reputation is so notoriously bad as to furnish grounds to believe her conduct will be offensive, or whose demeanor at the time is offensive, may properly be removed, yet for unchastity not affecting her conduct, and furnishing no reasonable ground of apprehension that she will misbehave, she can not be removed.

<sup>2</sup> *Jencks v. Coleman*, 2 Sumn. C. C. R., 221; *State v. Chovin*, 7 Iowa, 204; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249.

<sup>3</sup> *State v. Chovin*, 7 Iowa, 204; *Crock-*

*er v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249; *P., C. & St. L. Ry. Co. v. Vandyne*, *supra*. Nor one who has purchased his ticket, though innocently, with counterfeit money: *Memphis & Charleston R. R. Co. v. Chastine*, 54 Miss. 503, 17 Am. Ry. Rep. 430. Any person may purchase a land exploring ticket, even a resident of the state to which the excursion is conducted, provided no misrepresentations are used to obtain it; but if limited by its terms to the purchaser's use, no other can use it; *Gregory v. Burlington & Mo. River R. R. Co.*, 10 Neb. 250; *S. C.* 1 Am. & Eng. R. R. Cas. 270. Possession of the ticket is *prima facie* evidence of ownership: *Ibid*. Even if the ticket be obtained by false representations, the contract is only voidable, not void, and the company could not retain the excess over regular fare and eject the passenger: *Ibid*.

<sup>4</sup> *State v. Chovin*, 7 Iowa, 204; *Stone v. Chicago & N. W. Ry. Co.*, 47 Ia. '82, 17 Am. Ry. Rep. 461; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249; *Murphy v. Union Ry Co.*, 118 Mass. 228, '9 Am. Ry. Rep. 282; *New Or-*

Passengers are entitled to civil treatment from conductors, on the one hand, and on the other are bound to obey the lawful requirements, rules and regulations in reference to persons being carried on the trains, for the comfort not only of other passengers, but for the safety of the trains; and if rebellious in that respect, or personally offensive in resisting such rules and violating good order, by act, or by violent, or profane, or obscene language, unsuitable to the presence of ladies and gentlemen upon the train, they may be ejected by using no more force than is reasonably necessary to that end.<sup>1</sup>

The more general rule is, that passengers upon a railroad train without tickets, who decline to pay their fare, may be put off the train by the conductor, he using no more force than is necessary to effect their removal, in case of their refusal to leave.<sup>2</sup> Nor is the conductor bound to proceed to a station before doing so, but he may stop the train between stations, and there put such passengers off. To require them to be carried to the station would impose on the company the carriage of them for nothing; and so on, upon the next train coming along, from train to train, and from station to station, to their journey's end.<sup>3</sup>

The force to be used on such occasions is that only which is

leans, *St. Louis & Chicago R. R. Co. v. Burke*, 53 Miss. 200, 9 Am. Ry. Rep. 308; *M. & C. R. R. Co. v. Chastine*, *supra*. And the company will be liable, if they fail to eject such persons, for injury inflicted by them on other passengers: *New Orleans, St. L. & C. R. R. Co. v. Burke*, *supra*. And a person thus ejected for non-payment of fare, who afterwards re-enters the train, must pay his fare from the station where he first entered the train, and not merely from the point where he was ejected, otherwise he may be again expelled from the train: *Stone v. C. & N. W. Ry. Co.*, *supra*. And the question of his good intent or purpose will not aid him: *Ibid*.

<sup>1</sup> *Chi. & N. W. Ry. Co. v. Williams*, 55 Ill. 185; *Chi., B. & Q. R. R. Co. v. Griffin*, 68 Ill. 499. The case of

*Stone v. C. & N. W. Ry. Co.*, *supra*, announces a different doctrine, holding that by the refusal of a passenger to pay his fare, he deprives himself of the right to courteous treatment, and can not complain of the misconduct of employes of the company. This case, however, was one of contract for failure to carry. In cases of tort, they say, the contrary rule prevails.

<sup>2</sup> *McClure v. The Phila., Wilmington & Baltimore R. R. Co.*, 34 Md. 532; *S. C. 6 Am. R. 345*; *State v. Chovin*, 7 Iowa, 204; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249; *Downs v. N. York & N. Haven R. R. Co.*, 36 Conn. 287.

<sup>3</sup> *McClure v. The Phila., Wilmington & Baltimore R. R. Co.*, 34 Md. 532; *State v. Chovin*, 7 Iowa, 204.

necessary, and no more.<sup>1</sup> Nothing should be done, or even said, for the mere purpose of showing authority, or gratifying the pride of authority or feelings of the officer, who, on the contrary, should not allow himself to become excited unnecessarily on the subject, but should meet it coolly, and as a mere matter of duty.<sup>2</sup> The passenger should first be informed of the occasion and necessity for leaving, and the train brought to a standstill to enable him safely to do so. He should then be civilly requested to leave, and if he refuses, the conductor should then lay his hands on him gently and request him to leave; if he still refuse, the officer may then use force, and if resisted by using blows, should call to his assistance a sufficient number of those employed in running the train to effect the removal.<sup>3</sup>

But it is holden that, in a suit which involves the readiness of a party to pay the fare of a railroad, that a formal and strictly legal tender thereof should be alleged in the pleadings.<sup>4</sup> If ready and willing to pay, and the party offers to pay the same when it is demanded by the conductor, then he has a right to be carried, if there be no other objection, and there be room in the cars.<sup>5</sup> This results from the nature of the duty of the company, which is to receive and carry all persons as passengers wishing to become such, provided they in good faith offer to pay the usual fare.<sup>6</sup>

Some authorities maintain that the refractory or delinquent passenger is to be carried to the next station, and under no circumstances, for mere non-payment of fare, is to be put off between stations;<sup>7</sup> but such is not believed to be the correct rule except where required by statute. In case, however, the passenger be sick, or aged, or lame, or a child or a delicate woman, the expulsion should never be elsewhere than at a regular station. It is laid down as a rule of law that sick or aged persons, delicate women, persons lame or infirm, and children, are entitled to more care and attention, and, we would add, more tolerance

<sup>1</sup> McClure v. Phila., Wilmington & Baltimore R. R. Co., 34 Md. 532; S. C. 6 Am. R. 345; Shedd v. Troy & Boston R. R. Co., 40 Vt. 88.

<sup>2</sup> Crocker v. New London, Willimantic & Palmer R. R. Co., 24 Conn. 249.

<sup>3</sup> *Ibid.*

<sup>4</sup> Tarbell v. Cent. Pacific R. R. Co.

of California, 34 Cal. 616.

<sup>5</sup> Tarbell v. Cent. Pacific R. R. Co. of California, 34 Cal. 616.

<sup>6</sup> Tarbell v. Cent. Pacific R. R. Co. of California, 34 Cal. 616.

<sup>7</sup> It is so in Illinois by statute: Chi. & Alton R. R. Co. v. Flag, 43 Ill. 364.

and kindness, from the company's servants, than persons of good health, and laboring under no disabilities or infirmities.<sup>1</sup>

The company may discriminate, as to the price of carriage of passengers, between those who pay upon the train and those who purchase tickets before embarking; and may therefore exact a larger sum for passage from the former than the price of tickets at the station. Moreover, when entitled to such enlarged sum, if payment thereof be not made, and the passenger has no ticket, the conductor may remove such passenger from the train, by using no more force for such purpose than is necessary, and resorting to no unnecessary harshness.<sup>2</sup>

In the case of *Crocker v. The New London, Willimantic & Palmer R. R. Co.*, above cited, the rule is asserted that the case is not different if the office was closed, and the passenger could not procure a ticket; that railroad companies are not bound to keep open an office to sell tickets, or bound to sell tickets at all, for that matter, and though willing to carry for less on a ticket than for cash paid on the car, yet no obligation rests on them to afford at all times convenience to buy them; that the offer to sell tickets, contained in posted notices, is not a continuous one any longer than the office is open for their sale, and does not amount to a contract until accepted by the other party; and that a mere desire or willingness to accept, fixes no liability on the company. But in a more numerous class of cases it is held that, to entitle the company to charge, and the conductor to exact, such increased rate of passage by reason of the passenger not having procured a ticket before embarking, and to authorize the expulsion of a passenger from the cars for refusing to pay such enlarged price, the company must in good faith afford to passengers a reasonable and proper opportunity to avail themselves of the advantage by purchasing tickets, and thereby avoid the disadvantages of such discrimination.<sup>3</sup>

<sup>1</sup>*Sheridan v. The Brooklyn City & Newtown R. R. Co.*, 36 N. Y. (9 Tifany), 39.

<sup>2</sup>*Du Laurans v. St. Paul & Pacific R. R. Co.*, 15 Minn. 49; S. C. 2 Am. R. 102; *The State v. Chovin*, 7 Iowa, 204; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249.

<sup>3</sup>*Du Laurans v. The St. Paul & Pacific R. R. Co.*, 15 Minn. 49; S. C. 2 Am. R. 104; *Chi., Burlington & Quincy R. R. Co. v. Parks*, 18 Ill. 464; *St. Louis, Alton & Chi. R. R. Co. v. Dalby*, 19 Ill. 364; *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 3; *Evans v. Memphis & Charleston R. R. Co.*, 56 Ala. 246, 18 Am. Ry. Rep. 350.



If a passenger tender to a conductor a less sum than the actual rate of fare to a particular place, in good faith, and intending it as fare for that station, and the same be received by the conductor, he knowing at the time the purpose for which it is tendered, such conductor may not retain the amount and still refuse to carry the passenger to the indicated point. If he will put the passenger off at an earlier station, or other place than that of his destination, he must return the amount received, and place the passenger in the position, in that respect, in which he was before payment of the money. He may not be set down at some intermediate station corresponding in distance to the amount so paid, and the conductor, for passage thus far, retain the passage money.<sup>1</sup>

And so in regard to a person traveling on a commutation ticket; a condition annexed to such ticket, that to enable the holder to have its benefits, he should exhibit it to the conductor on every trip, or else, if not shown when requested, should pay the regular fare for such trip, is a reasonable one, and on not complying with it when requested by the conductor, a passenger becomes liable, as other passengers, to pay the ordinary fare, and on refusal to do so may be put off the cars by such conductor; and if no unlawful means or acts be resorted to in expelling him, no action will lie for such expulsion.<sup>2</sup>

The ruling in Michigan is, that at common law the company

<sup>1</sup> *Du Laurans v. St. Paul & Pacific R. R. Co.*, 15 Minn. 49; S. C. 2 Am. R. 102.

<sup>2</sup> *Downs v. N. Y. & New Haven R. R. Co.*, 36 Conn. 287; S. C. 4 Am. R. 77. And see *Crawford v. Cincinnati, Hamilton & Dayton R. R. Co.*, 26 Ohio St. 580, 13 Am. Ry. Rep. 387. A thousand-mile ticket, good only between certain dates, will not be available after those dates, even though its use had been permitted for a time after its expiration: *Sherman v. Chicago & Northwestern Ry. Co.*, 40 Ia. 45, 8 Am. Ry. Rep. 410. And see *Powell v. Pittsburg, Cincinnati & St. Louis R. R. Co.*, 25 Ohio St. 70, 13 Am. Ry. Rep. 477; *Lillis v. St. Louis,*

*Kansas City & Northern Ry. Co.*, 64 Mo. 464, 17 Am. Ry. Rep. 220. Where the plaintiff bought a season ticket, good for one month, and left a deposit with the company, agreeing to be bound by certain conditions, among others that the ticket was to be delivered up the day after its expiration, and that on failure so to do the deposit was to be forfeited; it was held the performance of the conditions was a condition precedent to the return of the deposit, and the ticket not being delivered up until a few days after its expiration, the deposit could not be recovered: *Cooper v. London, Brighton & South Coast Ry. Co.*, Law Rep., 4 Exch. Div. 88.

are not required to carry a passenger, who is wrongfully aboard the train as such, to any particular place or station before exercising the right of expulsion, but may put him off the cars at any place that will not expose him to peril, if the same be done without any more force than is necessary, and be unaccompanied by any wrong act.<sup>1</sup> The conductor is regarded as supreme in authority on the train, as if a captain on board ship, and his acts in the line of his business are the acts of the company, for which it is liable; but not for his acts of wantonness or malice, unconnected with the discharge of his duties.<sup>2</sup>

The rule of the statute, in Illinois, that for non-payment of fare, or for want of a ticket, passengers may only be expelled from the cars at regular stations,<sup>3</sup> does not apply to expulsions for disorderly conduct, or disobedience of the reasonable rules and regulations of the company. The right to expel for these is as at common law;<sup>4</sup> and its exercise is a duty which the company owe not only to themselves, but to the comfort and safety of its passengers, as also to the cause of good order and morals.

**7. Accommodation and treatment of passengers.**—A railroad company, as carriers of passengers for hire, are not only under obligation to extend to passengers a reasonable degree of convenience and comfort for their approach to and reception on to the trains, but also to use every reasonable care and precaution for their safety whilst passing over the road.<sup>5</sup> Transportation by railway is one of the highest efforts of science and art, and imposes upon those employed in it a degree of care and circumspection unknown to other modes of conveyance. It implies also authority in the direction and management thereof.<sup>6</sup>

It is also the duty of railroad companies to protect their female

<sup>1</sup>The Great Western R. W. Co. of Canada v. Miller, 19 Mich. (1 Clarke), 305.

<sup>2</sup>The Great Western R. W. Co. of Canada v. Miller, 19 Mich. (1 Clarke), 305; Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

<sup>3</sup>Chi. & Alton R. R. Co. v. Flagg, 43 Ill. 364.

<sup>4</sup>Ill. Cent. R. R. Co. v. Whittemore, 43 Ill. 420.

<sup>5</sup>Hibbard v. N. Y. & Erie R. R. Co.,

15 N. Y. 455; Allender v. Chicago, Rock Island & Pacific R. R. Co., 43 Ia. 276, 14 Am. Ry. Rep. 443; Central R. R. & Banking Co. v. Perry, 58 Ga. 461, 16 Am. Ry. Rep. 122. Whether it is the duty of employes to assist passengers getting on the cars depends on circumstances, and should be left to the jury: Allender v. C., R. I. & P. R. R. Co., *supra*.

<sup>6</sup>Hibbard v. N. Y. & Erie R. R. Co., 15 N. Y. 455.

passengers from insult, or from indecent approaches or assaults; and if a conductor is guilty of such conduct the company is liable in compensatory damages.<sup>1</sup> And so they are liable, in a similar rule of damages, if they fail to eject from the cars drunken, disorderly, or riotous persons, who assault or annoy other passengers.<sup>2</sup>

While it is the duty of railroad companies to provide safe and convenient means of egress and ingress to and from its cars, they are not liable without some proof of negligence in that regard. And so where a passenger fractured her knee cap in simply stepping from the lowest step of the car platform to the ground, without any apparent external cause, no presumption of negligence arises.<sup>3</sup>

The cars of the company must not only come to a standstill at the stations, but must so remain a sufficient length of time in which to allow passengers to leave the cars in safety; and if they do not, and injury ensues by reason thereof, the injured party, if not himself in any manner contributing to the injury, will be entitled to his action for the damages occasioned thereby.<sup>4</sup> In some of the states, however, as, for instance, in Illinois and Georgia, instead of contributory negligence, the rule of comparative negligence prevails. By this rule, the negligence of the parties is compared and weighed, and to hold the company liable, its negligence must be greater than that of the plaintiff.<sup>5</sup>

The case of the *Pennsylvania Railroad Company v. Kilgore*, 32 *Pennsylvania St.* 292, above cited, involved an injury to a

<sup>1</sup> *Craker v. Chicago & Northwestern Ry. Co.*, 36 *Wis.* 657, 9 *Am. Ry. Rep.* 118.

<sup>2</sup> *New Orleans, St. Louis & Chicago R. R. Co. v. Burke*, 53 *Miss.* 200, 9 *Am. Ry. Rep.* 308; *Putnam v. Broadway & Seventh Ave. R. R. Co.*, 55 *N. Y.* (10 *Sick.*), 108, 113.

<sup>3</sup> *Delaware, Lackawanna & Western R. R. Co. v. Napheys*, 90 *Penn. St.* 135; *S. C.* 1 *Am. & Eng. R. R. Cas.* 52.

<sup>4</sup> *Toledo, W. & W. Ry. Co. v. Baddeley*, 54 *Ill.* 19; *S. C.* 5 *Am. R.* 71; *Pennsylvania R. R. Co. v. Kilgore*, 32 *Penn. St.* (8 *Casey*), 292; *Fairmount &*

*Arch Street Pass. R. W. Co. v. Stutler*, 54 *Penn. St.* 375; *Jeffersonville R. R. Co. v. Hendricks*, 26 *Ind.* 228; *Davis v. The Chicago & N. Western Ry. Co.*, 18 *Wis.* 175; *Imhoff v. Chicago & Mil. R. R. Co.*, 22 *Wis.* 681; *Howell v. St. Charles Street R. R. Co.*, 22 *La. An.* 603; *Western R. R. Co. v. Young*, 51 *Geo.* 489; *S. C.* 7 *Am. R. W. Reps.* 352.

<sup>5</sup> *Chicago & N. W. Ry. Co. v. Simonson*, 54 *Ill.* 504; *S. C.* 5 *Am. R.* 155; *Western R. R. Co. v. Young*, 51 *Geo.* 489; *S. C.* 7 *Am. R. W. Reps.* 352; *post*, chap. 52, subdn. 2.

lady passenger, received in the act of leaving the cars. The court referred to the jury the question whether reasonable time was given for her to leave. The jury, in finding for plaintiff, necessarily, to arrive at such conclusion, found that reasonable time was not allowed. The court say: "It is an established fact, then, that the company did not give her, in the actual circumstances in which she was placed, reasonable time to leave the cars in safety." The circumstances were that she was a sickly woman, with three small children in her charge; that while she was engaged in getting them off, the cars started, and she leaped to the platform, on which one of the children had fallen, and in so doing she fell between the cars and the platform, and was injured. The Supreme Court, whilst fully recognizing the correctness of the doctrine that it is negligence to attempt to leave a moving train, held, and no doubt correctly so, that the company having involved her in an attempt to leave, or into the act of leaving, and yet denied to her time to accomplish it, her efforts to do so were not to be imputed to her as negligence; and that the case was not parallel with one in which, there having been no stop made at all, the passenger nevertheless, when about to be carried past his station, injures himself by leaping from the moving train. The court held, substantially, and so said, that it would be as unreasonable to impute negligence to the person thus endeavoring to leave in the one case, when the cars had stopped to enable her to do so, as it would be to hold, in the other case, that leaping from a passing train is not negligence.<sup>1</sup>

If, however, the train stops a reasonable time for the passengers to leave the cars in a comfortable manner, and a passenger, instead of availing himself thereof to retire from the car, delays getting off, as he might have done, until the car is moving or about to move, and is therefore injured, without the negligence of the company, or other circumstance on its part than the movements of the train in leaving, then in such case the injured party can not recover against the company.<sup>2</sup> In the case here

<sup>1</sup> *Pennsylvania R. R. Co. v. Kilgore*, 32 Penn. St. (8 Casey), 292, 296.

<sup>2</sup> *Illinois Cent. R. R. Co. v. Slatton*, 54 Ill. 133; S. C. 5 Am. R. 109; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228. And whether a reasonable

time be given or not, or no stop shall be made, it is careless to attempt to leave the car when it is in motion; and if one is injured in so doing there can be no recovery, unless the injury be wantonly caused: *Jeffersonville R. R.*

cited, the Supreme Court of Illinois, BREESE, Justice, say: "The proof is abundant that the train stopped an unusual time—for a time sufficient to enable the passengers to leave it safely. If the deceased did not avail of this opportunity, but chose to attempt to get off when the train was again in motion, and this without the direction or knowledge of any employe on the train, it was his folly, and the consequences of it must rest upon him alone."<sup>1</sup>

In case of running arrangements between two railroad companies, by which their trains meet at a particular junction, and passengers are received from each on to the other upon through tickets, it is the duty and obligation of each company to afford a reasonable time for the transfer of passengers and their baggage;<sup>2</sup> and if such reasonable time be not given, and a passenger thus transferring from one train to the other receives an injury in attempting to enter on the train to which he is transferring, he will not be held to so strict a rule as to contributory negligence, under circumstances thus calculated to confuse and disconcert him, growing out of the failure of the opposite party to strictly perform its duty, as he would be under ordinary circumstances.<sup>3</sup> And of the question of negligence under the circumstances the jury are the judges.<sup>4</sup>

By the rule in Illinois, although a passenger who voluntarily leaps from a train while it is in rapid motion, for no other reason than that he is being carried past his station, is guilty of such gross negligence that he can not recover for injuries received, as this would, in such case, be an entire absence, on his part, of ordinary care,<sup>5</sup> yet in case the station is reached and called, but not a reasonable opportunity and time allowed in which to leave the car before the train proceed again, and the passenger, before the motion becomes at all rapid, and whilst stepping from the train would not seem dangerous to a person of ordinary prudence, attempts to leave and is injured, he may in such case, and under such circumstances, recover for the injury; forasmuch as the pas-

Co. v. Hendricks, 26 Ind. 228, 233;  
Jeffersonville R. R. Co. v. Swift, 26  
Ind. 459.

<sup>1</sup> 54 Ill. 139.

<sup>2</sup> Johnson v. West Chester & Phila.  
R. R. Co., 70 Penn. St. 357.

<sup>3</sup> Johnson v. West Chester & Phila.  
R. R. Co., 70 Penn. St. 357.

<sup>4</sup> Johnson v. West Chester & Phila.  
R. R. Co., 70 Penn. St. 357.

<sup>5</sup> Ill. Cent. R. R. Co. v. Able, 59 Ill.  
131.

senger in such case is chargeable with no appreciable negligence, and the company is guilty of a flagrant breach of duty.<sup>1</sup> If, however, the passenger in such case remain aboard the train, and submit to being carried past his place of destination, under the circumstances before stated as to want of a reasonable opportunity to leave, he will be entitled to his action against the company, and may recover therein reasonable damages, as the same may have accrued to him from being carried past his place of destination.<sup>2</sup>

Passengers are entitled to a reasonable time at stations in which to leave the cars in safety;<sup>3</sup> but the age or decrepitude of a passenger is not to determine the length of time or stoppage. There must be a reasonable time, whether the passengers be young or old.<sup>4</sup>

Passengers purchasing tickets which purport to be general in their nature as to ordinary passenger trains, may not be precluded from traveling, by virtue thereof, on regular trains, although there be rules of the company confining their use to a certain class of trains, or to certain special trains, unless the purchase of such tickets be made with knowledge of such rules, and that the tickets are not available on regular trains.<sup>5</sup> In such cases, if a controversy arise in law as to the right of the holder to use such ticket upon ordinary general trains, parol evidence may be given to prove notice to the passenger, at the time of the purchase of the ticket, that it would be good only on certain trains, and would not enable him to pass upon the general or regular trains of the company.<sup>6</sup>

A passenger in a railway train is entitled to the ordinary comfort of a seat therein, and is not bound to pay fare, or to surrender his ticket, if he has a ticket, until a seat be furnished to him.<sup>7</sup> But he can not, though no seat be allowed him, remain on the train and pass free thereon until he obtains a seat, and then retain his ticket and pay fare only from that point to his place of destination.<sup>8</sup>

<sup>1</sup> Ill. Cent. R. R. Co. v. Able, *supra*.

<sup>2</sup> Ill. Cent. R. R. Co. v. Able, 59 Ill. 131.

<sup>3</sup> Toledo, Wabash & Western Ry. Co. v. Baddeley, 54 Ill. 19, 24, 25.

<sup>4</sup> Toledo, Wabash & Western Ry. Co. v. Baddeley, 54 Ill. 19, 24, 25.

<sup>5</sup> Maroney v. Old Colony & Newport

Ry. Co., 106 Mass. 153.

<sup>6</sup> Maroney v. Old Colony & Newport Ry. Co., 106 Mass. 153.

<sup>7</sup> Davis v. Kansas City, St. Joe & Council Bluffs R. R. Co., 53 Mo. 317.

<sup>8</sup> Davis v. Kansas City, St. Joe & Council Bluffs R. R. Co., 53 Mo. 317.

If he would claim damages for not being carried according to his contract, which is implied by the ticket, he should leave the train at the first suitable opportunity.<sup>1</sup>

8. **May set apart certain cars exclusively for ladies, and for gentlemen accompanied by ladies.**—A railroad company may set apart a part of their cars for the use of ladies, and gentlemen accompanied by ladies. Such a regulation is a reasonable one, and the power of the company to adopt it is an unquestionable one.<sup>2</sup> But it may not “capriciously discriminate between passengers on account of their nativity, color, race, social position, or their political or religious beliefs.” To exclude a woman from a car so set apart for ladies, and for gentlemen accompanied by ladies, merely on account of her color, is actionable; and if wantonly done, the party excluded may, in addition to actual damages, recover smart money for the “indignity, vexation and disgrace to which the party has been subjected.” The actual pecuniary damage would ordinarily be no compensation at all, and no wholesome effect would be produced upon the wrongdoer by the verdict.<sup>3</sup>

But, in some instances, it has been holden not to be an unreasonable regulation, with a view to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions likely to arise from well-known repugnancies, to require colored persons to occupy seats in a car furnished for that purpose by the company, the same being equally safe and comfortable as those furnished for other passengers.<sup>4</sup>

<sup>1</sup> *Davis v. Kansas City, St. Joe & Council Bluffs R. R. Co.*, 53 Mo. 317.

<sup>2</sup> *Bass v. Chicago & Northwestern Ry. Co.*, 36 Wis. 450, 9 Am. Ry. Rep. 101; *Peck v. N. Y. Cent. & Hudson River R. R. Co.*, 70 N. Y. 587, 19 Am. Ry. Rep. 1. But such a regulation must be reasonably enforced, and if here are no other seats provided for passengers, it is a breach of the contract of carriage to deny a gentleman a seat in the “ladies’ car”: *Bass v. C. & N. W. Ry. Co.*, *supra*. The company is liable, however, for excessive force in expelling the passenger: *Peck v. N. Y. Cent. & Hudson River R. R. Co.*,

*supra*.

<sup>3</sup> *Chi. & N. Western Ry. Co. v. Williams*, 55 Ill. 185; *Alexandria & Washington R. R. Co. v. Brown*, 17 Wall. 445; *Coger v. Northwestern Union Packet Co.*, 37 Ia. 145, 8 Am. Ry. Rep. 101. In the case of *Chi. & N. W. Ry. Co. v. Williams*, *supra*, the exclusion being public, and in a rude manner, the court held two hundred dollars damages not an unreasonable amount, when awarded by a jury.

<sup>4</sup> *West Chester & Phila. R. R. Co. v. Miles*, 55 Penn. St. R. 209; *Chi. & N. Western Ry. Co. v. Williams*, 55 Ill. 185.

The case of the *Alexandria & Washington R. R. Co. v. Brown* arose under the act of Congress, 12 Stat. at Large, 805, granting the right of way to the company to enter and occupy certain streets in the city of Washington. One condition of the grant was that no person should be excluded from the cars of the company on account of color. The Supreme Court of the United States, DAVIS, Justice, held that this provision is not to be taken literally; but is an inhibition against discrimination between races by placing them in different cars of a train; in short, in the language of the Supreme Court, that "the colored and white race, in the use of the cars," should "be placed on an equality."<sup>1</sup> The court, in construing the act of Congress, say: "There was no occasion in legislating for a railroad corporation to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. The right had never been refused, nor could there have been in the mind of any one an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—south as well as north—to transport, if paid for it, all persons, whether white or black, who should desire transportation. It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all. Congress, in the belief that this discrimination was unjust, acted."<sup>2</sup>

**9. For improper conduct a passenger may be removed from a ladies' car.**—For disorderly or improper conduct, passengers may be removed from a car occupied by ladies, or, as it is sometimes termed, the ladies' car, into another car; and if done at a proper time and place, and in a proper manner, no action will lie therefor.<sup>3</sup> Indeed, it would seem to result from the very duty due from the company to its orderly passengers, that such as may render themselves obnoxious to orderly and decent persons, by actions or language unfit for their presence, should be excluded, not only from cars occupied by ladies, but from all cars occupied by other persons than such disorderly persons themselves; and that therefore it becomes an obligation of the company to orderly

<sup>1</sup> *Alexandria & Washington R. R. Co. v. Brown*, 17 Wall. 445, 453.

<sup>3</sup> *Marquette v. Chi. & N. W. R. R. Co.*, 33 Iowa, 562.

<sup>2</sup> 17 Wall. 452, 453.



passengers to put the disorderly off the entire train, if guilty of conduct too gross for the presence of others—more especially so if demanded by such orderly passengers.<sup>1</sup> But under all circumstances, no more force or violence, or offensive conduct on the part of the conductor or those removing such passenger, should be used than what may be necessary to effect the object.<sup>2</sup>

The facts involved as alleged cause for removal or exclusion from one car to another, or from the entire train, as the case may be, as also the facts involved in questions growing out of the manner of such removal, and of the circumstances and time of the same, are all questions of fact for the decision of a jury.<sup>3</sup>

If a passenger or person be wrongfully upon the train, the conductor, in case he refuse to leave on request, on stopping the train for that purpose, may use reasonable force to put him off; but it must be done dispassionately, prudently, and unaccompanied with abusive language or unnecessarily abusive acts.<sup>4</sup> If, however, a person wrongfully attempt to enter upon a train upon which he has no right to enter, then force, but not unnecessary force, may be used to prevent him, and no accountability will rest upon the company for resulting injury, unless it be caused wantonly.<sup>5</sup>

**10. Through-ticket passengers bound to go directly through.**—The contract of purchase of a ticket is an entire contract, and is indivisible. It is a contract to transport the passenger between the points indicated as one entire service for the whole distance, and not by piecemeal or broken journeys. The company is not bound to provide accommodations and transportation in parcels and at different times, but are entitled to render the whole service in one and the same transaction or trip. Therefore, if the passenger leaves the train, and afterwards takes a different one, the company may exact fare from him as if he had never had any ticket. There is no obligation on the company at any time to give lay-over tickets to passengers; yet it may do so in

<sup>1</sup> *Marquette v. C. & N. W. R. R. Co.*, *supra*.

<sup>2</sup> *Marquette v. The Chi. & N. W. R. R. Co.*, 33 Iowa, 562; *Hilliard v. Goold*, 34 N. H. 230; *State v. Ross*, 2 Dutch. 224; *Kline v. Cent. Pacific R. R. of California*, 37 Cal. 400.

<sup>3</sup> *Marquette v. Chi. & N. W. R. R. Co.*, 33 Iowa, 562.

<sup>4</sup> *Kline v. Cent. Pacif. Railroad of California*, 37 Cal. 400.

<sup>5</sup> *Kline v. Cent. Pacif. R. R. of California*, 37 Cal. 400.

its discretion, as a mere act of accommodation. It is never to be regarded as a right of the passenger.<sup>1</sup>

Passengers holding through tickets, having selected their train and entered on their journey therein, have no right in law to leave their train at a way station on their route, and afterward enter another train of the company, and thereon proceed to their original place of destination, without procuring other tickets, or paying fare from the station where they again enter the cars.<sup>2</sup> They are bound by their ticket contract to proceed directly to the place to which their tickets entitle them to go, when they have once started on their journey.<sup>3</sup> "A contrary doctrine," say the court, in *Cleveland, Columbus & Cin. R. R. Co. v. Bartram*, "would necessarily impose upon the carrier additional duties, the removal of baggage as well as the passenger from one train to another, and the consequent additional attention on the part of the company; also an increased risk of accidents, and a hinderance and delay not contemplated by a reasonable interpretation of their undertaking."<sup>4</sup>

In an able opinion of AGNEW, J., in *The Oil Creek & Allegheny River Railway Company v. Clark* (*supra*), the Supreme Court of Pennsylvania, treating of the question of a passenger's right

<sup>1</sup> *Churchill v. Chi. & Alton R. R. Co.*, 67 Ill. 390; *McClure v. Phila., Wil. & Balt. R. R. Co.*, 34 Md. 532; *Johnson v. Concord R. R. Co.*, 46 N. H. 213; *Beebe v. Ayres*, 28 Barbour, 275; *Bennett v. N. Y. Cent. & Hudson River R. R. Co.*, 69 N. Y. 594, 18 Am. Ry. Rep. 43; *Dietrich v. Pennsylvania R. R. Co.*, 71 Penn. St. 432; *Oil Creek & Allegheny River Ry. Co. v. Clark*, 72 Penn. St. 231; *Drew v. Central Pacific R. R. Co.*, 51 Cal. 425, 12 Am. Ry. Rep. 222; *Stone v. Chicago & N. W. R. R. Co.*, 47 Ia. 82, 17 Am. Ry. Rep. 461; *State v. Overton*, 4 Zabris-  
kie, 435; *Petrie v. Penn. R. R. Co.*, 42 N. J. 449; S. C. 1 Am. & Eng. R. R. Cas. 258. And evidence that plaintiff had been permitted at other times to stop over is inadmissible: *Stone v. C. & N. W. R. R. Co.*, *supra*.

<sup>2</sup> *McClure v. Phila., Wilmington &*

*Baltimore R. R. Co.*, 34 Md. 532; S. C. 6 Am. R. 345; *Cheney v. Boston & Maine R. R. Co.*, 11 Met. 121; *Dietrich v. Penn. R. R. Co.*, 71 Penn. St. 432; *Oil Creek & Allegheny River Ry. Co. v. Clark*, 72 Penn. St. 231; *Hamilton v. New York Cent. R. R. Co.*, 51 N. Y. (6 Sickels), 100; *Cleveland, Columbus & Cincinnati R. R. Co. v. Bartram*, 11 Ohio St. 457.

<sup>3</sup> *McClure v. Phila., Wilmington & Baltimore R. R. Co.*, 34 Md. 532; S. C. 6 Am. R. 345; *Cheney v. Boston & Maine R. R. Co.*, 11 Met. 121; *Dietrich v. Penn. R. R. Co.*, 71 Penn. St. 432.

<sup>4</sup> *Cleveland, C. & C. R. R. Co. v. Bartram*, 11 Ohio St. 463; *McClure v. Phila., Wilmington & Baltimore R. R. Co.*, 34 Md. 532; *State v. Overton*, 4 Zab. 438; *Dietrich v. Penn. R. R. Co.*, 71 Penn. St. 432.

on a through ticket to leave the train and take another at pleasure, say: "To hold that the passengers on every train have a right to stop and get on at pleasure, and that they are not bound by the terms of getting off unless notice can be shown by the company, would in effect take the government of their trains out of the hands of the company."<sup>1</sup> The same learned judge, in *Dietrich v. The Pennsylvania Railroad Company*,<sup>2</sup> holds the following language upon the subject: "Another reason is, that fare covers the ordinary luggage of the passenger, entitling it to be checked through to the point of destination. But if the passenger may stop off he may demand his baggage at each stoppage, or if it go on he will not be at the end of the journey to receive it." Thus the contract is an entirety, and the passenger himself commits a breach of it, and terminates it, when he leaves the train on which it entitles him to pass, and when he enters upon another train to proceed to his original place of destination; he not only commences a new journey, but must check his baggage anew, and for which he must pay, or else is liable to be put off the train.<sup>3</sup>

When passengers have thus left their train and stopped over at way stations, without permission, and have subsequently entered on another train to proceed upon their journey, if they have not other tickets, and refuse to pay fare, insisting to proceed upon their original tickets, the conductor has an undoubted right to put them off the train, using no more force than is necessary to effect their removal;<sup>4</sup> nor, according to the ruling in the leading case above cited, is the conductor compelled to put them off at some station, but may do so at any ordinarily safe

<sup>1</sup> 72 Penn. St. 231, 235.

<sup>2</sup> 71 Penn. St. 432, 438.

<sup>3</sup> *Dietrich v. Penn. R. R. Co.*, 71 Penn. St. 432; *Oil Creek & Allegh. River Ry. Co. v. Clark*, 72 Penn. St. 231; *McClure v. Phila., Wilmington & Baltimore R. R. Co.*, 34 Md. 532; *State v. Overton*, 4 Zab. 438; *Cleveland, C. & C. R. R. Co. v. Bartram*, 11 Ohio St. 463; *Cheney v. Boston & Maine R. R. Co.*, 11 Met. 121. The rule, however, is different, if from accident, misfortune or some cause without his fault, or without being voluntary on

his part, a passenger is interrupted in his transit. He may then resume it again: *Dietrich v. Penn. R. R. Co.*, 71 Penn. St. 432, 438. The passenger is bound by the rules and regulations of the company in this respect, so far as they are reasonable, and it is his duty to inquire and inform himself thereof: *Dietrich v. Penn. R. R. Co.*, *supra*.

<sup>4</sup> *McClure v. Phila., Wilmington & Baltimore R. R. Co.*, 34 Md. 532, 6. Am. Reps. 345, 347.

point on the road. The court say: "The establishment of such a principle would result in compelling railroad companies to carry a passenger to the station next to the one at which he entered the train, which might, and doubtless would, often turn out to be the very point to which he desired to be taken, and if the passenger were unknown to the conductor the company would be without remedy."<sup>1</sup>

It reasonably follows from this, and is the law, that a passenger traveling on a through ticket, who voluntarily leaves the train at an intermediate station, and remains over to another train, without permission to do so, and resumes his journey thereon, forfeits all right to be carried under his original contract.<sup>2</sup> If, boarding another train, he refuses to pay his fare, he may be expelled from the cars.<sup>3</sup> He could not complain if no other train ever came along upon which to resume his journey, so far as his contract of transportation on which he has thus arrived is concerned; for his contract is a through one, and the company are not bound to take him by partial stages.<sup>4</sup>

In the case cited from 11 of Metcalf—*Cheney v. The Boston & Maine Railroad Company*<sup>5</sup>—the court hold that the right of a passenger as to his transportation does not depend upon his knowledge, at the time of purchasing his ticket, of the difference in the price payable for a passage through the whole distance by one train, or that of a passage by different trains—that he may learn that by inquiring; but if he does not, he takes the mode of conveyance which the price of his ticket and the superscription thereon entitle him to, under the rules and regulations of the company. Though the ticket may not state that the passage is to be by one and the same train, yet as it does not on the other hand purport to be for two or more separate ones, but in that respect is silent, it therefore follows that the contract arising out of it is one for carriage in the usual manner in which passengers are carried who hold such tickets. Not so, however, with through tickets in the form of coupons,

<sup>1</sup> McClure v. Phila., Wilmington & Baltimore R. R. Co., 34 Md. 532, 538, 6 Am. Reps. 345, 349.

<sup>2</sup> State v. Overton, 4 Zab. (N. J.), 435, 438.

<sup>3</sup> State v. Overton, 4 Zab. (N. J.),

435, 438, 441, 442, 443.

<sup>4</sup> State v. Overton, 4 Zab. (N. J.), 435, 438.

<sup>5</sup> 11 Met. 121; S. C. 1 Am. R. W. Cas. 601.

sold by one of several companies forming a continuous route; for though they entitle the holders to pass over the entire route,<sup>1</sup> yet they are to be regarded as distinct tickets for each road, sold by the first company as agents for the others;<sup>2</sup> and the rights and liabilities of the parties are the same as if the tickets had been purchased of each company separately, at its own depot or station.<sup>3</sup> The liabilities and duties of each of such companies, in turn, continue in regard to such passengers from the place and time of receiving them until they reach the point where the liability of the next one of the connecting lines commences.<sup>4</sup> If the passengers are set down at a point that requires additional travel to reach the next connecting line, the company so setting them down short of connection with the place of connection will continue liable, as if on their own road, for accidents or injuries received while passing over the intermediate space.<sup>5</sup> It is the duty of each one of such companies, in turn, to see their passengers safely over the whole route to the next connecting line, as far as the utmost care will affect the same.

The wrongful taking of the ticket of a passenger by the conductor of one train of a railroad company, does not justify the passenger in entering upon another train of the company, and persisting in occupying a seat there and in being carried without producing a ticket or paying his fare. For such wrongful taking up of the ticket he has his remedy by action, and not by intrusion into a different train; and if he does so intrude, such a course of conduct being in violation of the reasonable rules and regulations of the company, requiring payment of fare or production of a ticket, the passenger may, therefore, be expelled from the cars.<sup>6</sup>

**11. As special carriers of passengers.**—A contract between a railroad company and a person for the free passage of the latter, in consideration of which the latter is to run all risk of accident, and by which the company is not to be liable for any injury to

<sup>1</sup> *Knight v. The Portland, S. & P. R. R. Co.*, 56 Maine, 234.

<sup>2</sup> *Knight v. The P., S. & P. R. R. Co.*, 56 Maine, 234.

<sup>3</sup> *Knight v. The P., S. & P. R. R. Co.*, 56 Maine, 234.

<sup>4</sup> *Knight v. The P., S. & P. R. R. Co.*, 56 Maine, 234.

<sup>5</sup> *Ibid.*

*Townsend v. New York Cent. & Hudson River R. R. Co.*, 56 N. Y. 295.

such person or to his property during the passage, whether the same be occasioned by the negligence of the company's servants or otherwise, is not to be regarded, if there be no other circumstances or other relation between the parties, as a contract with the company in its character of common carrier. In such case the company becomes a special carrier as to this particular person, and the special terms of carriage are to govern the rights of the parties.<sup>1</sup> A common carrier's obligation arises out of his undertaking to carry for hire all alike who come to be carried. He is not bound to carry gratuitously; he is only bound to carry for the ordinary hire. And though the mere act of waiving the compensation and carrying without hire will not, if there be no special agreement as to the terms thereof, exempt such common carrier from the moral obligation of ordinary care, yet an express agreement for exemption from liability for accidents occasioned by the negligence of servants and agents, or otherwise, made upon consideration of free passage, or a free ticket, is not contrary to law or the policy of the law, and will be valid to prevent a recovery against the company for injuries to the person or property of such passenger, occurring while passing on such agreement, unless the injury be wantonly inflicted.<sup>2</sup> To hold otherwise, the court say, would be to decide that a man, from the mere fact that his occupation is that of a common carrier, can not, as to an individual transaction, be a gratuitous bailee—and, we may add, a special bailee upon special terms of bailment agreed on. A railroad company, in thus contracting for immunity against loss, does not seek to escape from any part of its common law liability as common carrier, but places itself upon special terms, both as to carriage and liability. Carriage for nothing, for nothing liable.<sup>3</sup> It is not like the case of a free pass to an employe, or to a drover who passes with his stock, and in consideration thereof; for in such cases there is an implied compensation to the company in the services of the employe, and in the freights paid by the drover, and the necessitous care

<sup>1</sup> *Kinney v. The Cent. R. R. Co. of New Jersey*, 34 N. J. 513; S. C. 3 Am. R. 265; *Wells v. N. York Cent. R. R. Co.*, 24 N. Y. (10 Smith), 181; *Perkins v. N. Y. Central R. R. Co.*, 24 N. Y. 196; *Bissell v. The N. Y. Cent. R. R. Co.*, 25 N. Y. 442. But see,

*contra*, *Rose v. Des Moines Valley Ry. Co.*, 39 Ia. 246, 9 Am. Ry. Rep. 7.

<sup>2</sup> *Kinney v. The Cent. R. R. Co. of New Jersey*, 34 N. J. 513.

<sup>3</sup> *Kinney v. Cent. R. R. Co. of New Jersey*, 34 N. J. 513.

of the property on his part during transit, so that these persons are regarded as passengers, and the company in such cases are looked upon as common carriers of such persons, and as attempting to limit their liability as such by special agreement, which is, as with paying passengers, contrary to the policy of the law in this respect.<sup>1</sup>

The Supreme Court of the United States, BRADLEY, Justice, in the case cited here from 17 Wallace, after reviewing the whole question with great care and labor, come to and assert the following conclusions in regard to the power of a railroad company to limit its liability as carrier by special contract; and which they announce in language as follows:

“*First.* That a common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

“*Secondly.* That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

“*Thirdly.* That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

“*Fourthly.* That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.”<sup>2</sup>

The pass here referred to purported to be a free pass, but the court held it, notwithstanding, to be for a consideration. In that respect the court say: “It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his

<sup>1</sup>The Penn. R. R. Co. v. Henderson, 51 Penn. St. 315; Kinney v. Cent. R. R. Co. of New Jersey, 34 N. J. 513; The Cleveland, Painesville & Ash-tabula R. R. Co. v. Curran, 19 Ohio St. 1; S. C. 2 Am. R. 362; Ohio & Miss. R. R. Co. v. Muhling, 30 Ill. 9; Philadelphia & Reading R. R. Co. v. Derby, 14 How. 468; Steamboat New World v. King, 16 How. 469; N. Y. Cent. R. R. Co. v. Lockwood, 17

Wall. 357; Nolton v. Western R. R. Co., 15 N. Y. (1 Smith), 445; Smith, Admr., v. N. York Cent. R. R. Co., 24 N. Y. (10 Smith), 222; Ohio & Miss. Ry. Co. v. Selby, 47 Ind. 471, 8 Am. Ry. Rep. 177. But in Bissell v. N. Y. Cent. R. R. Co., 25 N. Y. (11 Smith), 442, there is a subsequent ruling to the contrary.

<sup>2</sup>N. Y. Cent. R. R. Co. v. Lockwood, 17 Wall. 357, 384.

cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire, can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."<sup>1</sup>

**12. Passengers carried free.**—Though passengers be carried gratuitously, and without any other understanding or condition whatever, yet they are not without the pale of legal protection as against the culpable carelessness of the company.<sup>2</sup> There is a duty arising in such cases, for a breach of which, resulting in an injury, an action will lie, if the injured party be not himself in fault contributing thereto. This duty requires the exercise of care and skill, in all cases, on the part of those engaged in carrying passengers, whether they be carried free or for pay.<sup>3</sup>

SELDEN, J., in the case cited from 15th New York, lays down the rule of such cases in the following language: "I entertain no doubt that in all cases where a railroad company voluntarily undertakes to convey a passenger upon their road, whether with or without compensation, in the absence, at least, of an express agreement exempting it from responsibility, if such passenger is injured by the culpable negligence or want of skill of the agents of the company, the latter is liable."<sup>4</sup> The learned judge then adds that "The matter of compensation may have a bearing upon the degree of negligence," but that no such question as the latter arose in that case.

Thus, a condition annexed to the use of a free ticket on a railroad in Illinois, that the passenger assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether of negligence of its agents or otherwise, for injury to his person or property, will not exempt the

<sup>1</sup> N. Y. Cent. R. R. Co. v. Lockwood, 17 Wall. 357, 359.

<sup>2</sup> *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Ohio & Miss. R. R. Co. v. Muhling*, 30 Ill. 9, 23, 24; *Gillenwater v. Madison & Indianapolis R. R. Co.*, 5 Ind. 339; *Phil. & Reading R. R. Co. v. Derby*, 14 How. 468; *Chi., Bur. & Quincy R. R. Co. v. Hazzard*, 26 Ill. 373.

<sup>3</sup> *Nolton v. Western R. R. Co.*, 15 N. Y. 444; *Ohio & Miss. R. R. Co. v. Muhling*, 30 Ill. 9, 23, 24.

<sup>4</sup> 15 N. Y. 450. Where a passenger, traveling on a free pass, refused to sign a contract upon the back of it releasing the company from all liability, and was thereupon peaceably expelled from the train, the court refused, on the facts, to review the discretion of the lower court in setting aside a verdict for five thousand dollars, as being excessive: *Elliott v. Western & Atlantic R. R. Co.*, 58 Ga. 454, 16 Am. Ry. Rep. 106.



railroad company from liability for injuries and damages occasioned by the gross negligence of the company, their agents or servants.<sup>1</sup> But in the same state it will exempt the company from accountability for mere accidents, and for ordinary negligence.<sup>2</sup> The courts of that state do not recognize the rule of New York, wherein a distinction is drawn between liability for the negligence of mere servants, and of the company acting through its constituted authorities.<sup>3</sup>

There are cases, however, in which it is held that a contract of a passenger, in consideration of passing free, to run the risk, not only of accidents, but also of the negligence of the company and its servants, is valid.<sup>4</sup>

And so there are settled rulings of the highest authority that passengers are sometimes passengers for hire, whose pass or ticket purports to be for a passage that is free—as where a person desirous to sell an invention to the company traveled on its cars on such a pass, with stipulations against liability for injuries, to see the officers in regard to the business, and at the request of the company, it was held to be a passage for hire.<sup>5</sup>

Where a pass has been obtained by misrepresentations, it is such a fraud upon the company as will vitiate the contract of carriage.<sup>6</sup>

**13. May make regulations, and passengers must conform thereto.**—It is well settled by authority that railroad companies may make such needful and reasonable regulations in regard to the reception and transportation of passengers upon their trains, as they may, in the experience and management thereof, find to

<sup>1</sup> Ill. Cent. R. R. Co. v. Read, 37 Ill. 484. And so held in Iowa, under their code: *Rose v. Des Moines Valley Ry. Co.*, 39 Ia. 246, 9 Am. Ry. Rep. 7.

<sup>2</sup> Ill. Cent. R. R. Co. v. Read, 37 Ill. 484.

<sup>3</sup> Ill. Cent. R. R. Co. v. Read, 37 Ill. 484. The rule that exempts the company from liability for any kind of its own negligence, by virtue of a free ticket and stipulation therein, is contrary to the general rulings elsewhere.

<sup>4</sup> *Kinney and others v. The Cent. R. R. Co.*, 3 Vroom (N. J.), 407; *Same v. Same*, 5 Vroom, 513; *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181; *Perkins v. The New York Cent. R. R. Co.*, 24 N. Y. 208; *Welles v. New York Cent. R. R. Co.*, 26 Barb. 641.

<sup>5</sup> *Grand Trunk Ry. Co. v. Stevens*, 5 Otto, 655. See also, in point, to same principle, *N. Y. Cent. R. R. Co. v. Lockwood*, 17 Wall. 357, and authorities in those cases cited.

<sup>6</sup> *Brown v. Mo., Kansas & Tex. Ry.*, 64 Mo. 536, 17 Am. Ry. Rep. 242.

be proper and just.<sup>1</sup> The business implies a degree of authority in those conducting it, as to the direction and management of trains, their progress over the road, and in regard to the time and manner in which passengers shall enter upon and depart from the cars, and the conditions upon which they may remain thereon, that is little less than absolute.<sup>2</sup> In the language of BROWN, Justice: "Such regulations as will enable a railroad corporation to execute its difficult and responsible duties, insure the comfort and safety of its passengers, and protect itself from wrong and imposition, it has an undoubted right to prescribe, provided such regulations are reasonable and just. It has a right to require that passengers shall preserve order; that they shall be seated, and not stand up in the passage way or upon the platforms; and that they shall abstain from any act which tends to impede or interrupt the conductors and managers in the transaction of their necessary business."<sup>3</sup>

It may also prescribe how and at what place passengers shall pay their fare, and what shall (to the conductor) be the evidence of such payment, and of the passenger's right to ride upon the train; may require passengers to accept temporary tickets, and to exhibit them to the conductor from time to time, upon request; and finally to re-deliver such tickets, on request, before leaving the cars. It is held that these rules may not only be made, but may be enforced by expulsion from the cars, or such other reasonable means as the company may have at its command, as necessary (some of them) for the security of the passengers, and others for protection of the company from imposition.<sup>4</sup>

<sup>1</sup>Hibbard v. N. Y. & Erie R. R. Co., 15 N. Y. 455; Commonwealth v. Power, 7 Met. 596; Hall v. Power, 12 Met. 482; Crocker v. New London, Willimantic & Palmer R. R. Co., 24 Conn. 249; Pittsburg & Connellsville R. R. Co. v. McClurg, 56 Penn. St. 294; Cleveland, Columbus & Cincinnati R. R. Co. v. Bartram, 11 Ohio St. 457; Crawford v. Cincinnati, Hamilton & Dayton R. R. Co., 26 Ohio St. 580, 13 Am. Ry. Rep. 387; Southern R. R. Co. v. Kendrick, 40 Miss. 374; Evans v. Memphis & Charleston R. R. Co., 56 Ala. 246, 18 Am. Ry. Rep. 350.

<sup>2</sup>Hibbard v. N. Y. & Erie R. R. Co., 15 N. Y. 455.

<sup>3</sup>Hibbard v. N. Y. & Erie R. R. Co., 15 N. Y. 463.

<sup>4</sup>Hibbard v. N. Y. & Erie R. R. Co., 15 N. Y. 455; Commonwealth v. Power, 7 Met. 596; Hall v. Power, 12 Met. 482; Crocker v. New London, Willimantic & Palmer R. R. Co., 24 Conn. 249; Cleveland, Columbus & Cincinnati R. R. Co. v. Bartram, 11 Ohio St. 457; Crawford v. Cincinnati, Hamilton & Dayton R. R. Co., 26 Ohio St. 580, 13 Am. Ry. Rep. 387; Law v. Illinois Central R. R. Co., 32

But if a passenger be wrongfully excluded from a train, he may get on again, if he can; and if, while trying to do so, an injury is inflicted on him by the company's servants, not contributed to by any rashness or negligence of his own, the company will be liable therefor.<sup>1</sup> To attempt to re-enter on the car, however, whilst the train is moving, is such want of care and prudence as will prevent a recovery for an injury received in so doing, where the injury is in part or the whole the result of such attempt.<sup>2</sup>

And so, in Minnesota, the company has a right to make reasonable rules and regulations for the transaction of its business with the public as common carriers, and of their reasonableness the court is the judge;<sup>3</sup> but a regulation which requires consignees of property to receive and receipt for the same when ready to be delivered, without being afforded an opportunity of knowing if that which is receipted for is actually delivered, and the condition thereof, is held in that state to be an unreasonable one, and therefore void.<sup>4</sup>

Strictly speaking, by-laws of a private corporation are such as

Ia. 534, 10 Am. Ry. Rep. 66; *St. Louis & S. E. Ry. Co. v. Myrtle*, 51 Ind. 566; *Ohio & Miss. Ry. Co. v. Applewhite*, 52 Ind. 540; *Falkner v. Ohio & Miss. Ry. Co.*, 55 Ind. 369, 16 Am. Ry. Rep. 262; *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Vandyne*, 57 Ind. 576, 18 Am. Ry. Rep. 454; *Johnson v. Concord R. R. Co.*, 46 N. H. 213; *Burlington & Mo. River R. R. Co. v. Rose*, 11 Brown (Neb.), 177; S. C. 1 Am. & Eng. R. R. Cas. 253. But if the person be ejected while the train is in motion, or in any dangerous way, the company will be liable: *Law v. Ill. Cent. R. R. Co.*, *supra*. And where a passenger has purchased a ticket, which is taken up by the conductor, who neglects to provide him with a check, in consequence of which he is thereafter ejected from the train on a change of conductors, the company is liable: *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Hennigh*, 39 Ind. 509, 10 Am. Ry. Rep. 414. A

general notice of such regulation is sufficient, if given for a reasonable time: *B. & M. R. R. Co. v. Rose*, *supra*.

<sup>1</sup> *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249, 264.

<sup>2</sup> *Crocker v. N. L., W. & P. R. R. Co.* Where a passenger refuses to pay his fare, and the train is stopped for the purpose of expelling him, he can not then proffer it and claim the right to be carried; but if the train is stopped at a station, and before expulsion the fare is proffered, it must be received, and for an expulsion under such circumstances the company is liable: *O'Brien v. N. Y. Cent. & Hudson River R. R. Co.*, 80 N. Y. 236; S. C. 1 Am. & Eng. R. R. Cas. 259.

<sup>3</sup> *Christian et al. v. First Divn. of St. Paul & Pac. R. R. Co.*, 20 Minn. 21.

<sup>4</sup> *Christian et al. v. First Div. St. Paul & Pac. R. R. Co.*, 20 Minn. 21.

bind the corporators only, and do not affect other persons; all regulations which do not operate upon third persons, nor in any way affect their rights, are, strictly speaking, what is meant by by-laws.<sup>1</sup> Their validity is purely a question of law for the court, and not the jury, to decide; whether the by-laws be in conflict with the law or with the charter, or be in a legal sense unreasonable, and therefore void, are questions of law for the court.<sup>2</sup> But there is a class of regulations of corporations and others as common carriers which are more extended and general in their operation, and which affect the rights and duties of others than the corporators and their servants. They are, strictly speaking, not by-laws of the corporation;<sup>3</sup> they are regulations. They relate to the comfort and convenience of passengers, and the just rights and convenience of the carrier. Their validity depends upon their reasonableness;<sup>4</sup> whilst the former are held to be reasonable if not unlawful.<sup>5</sup>

Questions as to the reasonableness of a regulation are for the jury to decide, if the regulations are to affect third persons or the public generally;<sup>6</sup> but by-laws affect only the members of the company, and their validity is to be decided on by the court.<sup>7</sup>

**14. Refusing to exhibit ticket, passenger may be expelled from cars.**—A regulation requiring passengers, on request, to exhibit their tickets from time to time to conductors *en route* upon trains, and in case of refusal or inability to do so to be put off the cars, is a reasonable one, and for refusal to conform to it a passenger forfeits his right to further carriage upon the train, and may be expelled therefrom;<sup>8</sup> and in case of such forfeiture by willful refusal to exhibit his ticket, he does not become again entitled to proceed by exhibiting his ticket after the train is

<sup>1</sup> *State v. Overton*, 4 Zabr. 435, 440.

<sup>2</sup> *State v. Overton*, 4 Zabr. 435, 440.

<sup>3</sup> *State v. Overton*, 4 Zabr. 435, 441, 442.

<sup>4</sup> *State v. Overton*, 4 Zabr. 435, 441, 442.

<sup>5</sup> *State v. Overton*, 4 Zabr. 435, 441, 442.

<sup>6</sup> *Morris & Essex R. R. Co. & others v. Ayres & others*, 5 Dutch. 393; *Bass v. Chi. & Northwestern Ry. Co.*, 36 Wis. 450, 9 Am. Ry. Rep. 101.

<sup>7</sup> *State v. Overton*, *supra*.

<sup>8</sup> *Hibbard v. N.Y. & Erie R. R. Co.*, 15 N. Y. 455; *Balt. & Ohio R. R. Co. v. Blocher*, 27 Md. 277. The ruling in Vermont is that the removal for not paying fare or showing ticket can only be at some station: *Stephen v. Smith*, 29 Vt. 160; but this is under the statute: *Id.*; *Shedd v. Troy & B. R. Co.*, 40 Vt. 88; *Jerome v. Smith et al.*, 48 Vt. 230.

stopped to put him off. The company running on time, which it is dangerous to lose, may not be trifled with in such a manner for the mere humor or whim of passengers.<sup>1</sup> In the case from 15 New York, *Hibbard v. The New York & Erie Railroad Company*, it is laid down as the law, and beyond doubt correctly so, that if a passenger, who has thus laid himself liable to be ejected from the cars, refuses to leave when ordered, and opportunity is given for him to do so, the conductor may employ so much force as may be necessary to effect his removal, but using no violence or unnecessary injury; and that if the passenger refuses to comply, and resists, and injury happens, it is an injury for which the company will not be responsible; for, say the court, "It is a result attributable to his own wrongful conduct." And such is doubtless the current of authorities.<sup>2</sup>

**15. They may collect increased fare, if paid on the cars.**—Both as a convenience for the transaction of business, as well as for the proper accountability of their agents and servants concerned in operating their trains, railroad companies may discriminate, as to the price of passage, in favor of those passengers who purchase tickets before entering on the trains; and may collect a higher price of those who pay their fare in the cars.<sup>3</sup> But such discrimination must be made and carried out in good faith, accompanied by a fair and reasonable opportunity for persons desiring to become passengers to purchase tickets before taking the trains, or else they have a right to pay upon the cars, and be carried at ticket rates.<sup>4</sup> But if, without an opportunity to purchase tickets being given by an office open for that purpose, a passenger be forced to pay the extra charge contemplated by the stat-

<sup>1</sup> *Hibbard v. N. Y. & Erie R. R. Co.*, 15 N. Y. 455; *O'Brien v. N. Y. Cent. & H. R. R. Co.*, 80 N. Y. 236; *S. C. 1 Am. & Eng. R. R. Cas.* 259; *Balt. & Ohio R. R. Co. v. Blocher*, 27 Md. 277.

<sup>2</sup> *Hibbard v. The N. Y. & Erie R. R. Co.*, 15 N. Y. 455, 464; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24 Conn. 249.

<sup>3</sup> *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *The State v. Chovin*, 7 Iowa, 204; *Crocker v. New London, Willimantic & Palmer R. R. Co.*, 24

Conn. 249; *Du Laurans v. 1st Div. St. Paul and Pacific R. R. Co.*, 15 Minn. 49; *Hilliard v. Gould*, 34 N. H. 230.

<sup>4</sup> *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *Chi., Burlington & Quincy R. R. Co. v. Parks*, 18 Ill. 460; *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 Ill. 353; *Chase v. New York Cent. R. R. Co.*, 26 N. Y. (12 Smith), 523; *Nellis v. New York Cent. R. R. Co.*, 30 N. Y. (3 Tiffany), 505; *Du Laurans v. St. Paul & Pacific R. R. Co.*, 15 Minn. 49.

ute to be paid when passage is paid upon the cars, the company become liable to the penalty provided in law for charging or taking over the regular rates.<sup>1</sup> For a refusal of a passenger to pay on the cars the discriminating price charged for passage when payable thereon, the conductor, by refusing to accept a lesser sum, may put the passenger off; but he may not accept the lesser sum when tendered, and still retaining the same, expel the passenger from the cars;<sup>2</sup> nor may he elect to receive and retain the amount tendered, and carry the passenger as far as the sum received will pay the fare, and then put him off.<sup>3</sup> Such are the rights only of passengers, however, who have boarded the cars and tendered the lesser fare in good faith, without design of advantage thereby.<sup>4</sup>

**16. Passengers taking wrong train.**—If a person mistake his train, and take a wrong one, he is nevertheless a passenger on the one he has taken, and is entitled to the rights of a passenger while remaining thereon, and the company are entitled to have from him the ordinary fare for the distance he travels.<sup>5</sup> The conductor is not bound to stop the train between stations to enable him to leave, nor elsewhere but at a regular station; but if he does, the passenger is entitled to the ordinary and proper treatment in leaving the train.<sup>6</sup>

And being so on a wrong train, whether by misdirection or otherwise, and he is informed thereof, and offered free carriage back to the proper connection for his destination, but will neither accept the same, nor pay, nor leave the train, he may then be expelled from the cars, at a suitable place and in a suitable manner.<sup>7</sup> The fact of the misdirection having been given by an agent of the company does not alter the case;<sup>8</sup> if thus directed to a train connecting with another train leading to his destination,

<sup>1</sup> Chase v. New York Cent. R. R. Co., 26 N. Y. 523; Nellis v. New York Cent. R. R. Co., 30 N. Y. (3 Tiffany), 505; Du Laurans v. St. Paul & Pacific R. R. Co., 15 Minn. 49.

<sup>2</sup> Du Laurans v. 1st Div. St. Paul & Pacific R. R. Co., 15 Minn. 49.

<sup>3</sup> Du Laurans v. 1st Div. St. Paul & Pacific R. R. Co., 15 Minn. 49.

<sup>4</sup> Du Laurans v. 1st Div. St. Paul &

Pacific R. R. Co., 15 Minn. 49.

<sup>5</sup> Columbus, Chi. & Indiana Cent. Ry. Co. v. Powell, Admr., 40 Ind. 37.

<sup>6</sup> C. C. & I. C. Ry. Co. v. Powell, *supra*.

<sup>7</sup> Barker v. New York Cent. R. R. Co., 24 N. Y. (10 Smith), 599.

<sup>8</sup> Barker v. New York Cent. R. R. Co., 24 N. Y. (10 Smith), 599.

and he proceeds thereon past the connection, which he by ordinary care may have discovered, it is his own fault.<sup>1</sup>

A ticket from A to B is not good for passage from B to A, notwithstanding the holder may have been permitted to so ride on similar tickets before over the same road.<sup>2</sup>

**17. Lay-over tickets.**—Though, from the fact that the contract of transportation arising out of the purchase of a ticket is an entire one, the company is not bound to give the passenger a lay-over ticket to enable him to stop by the way, yet it may do so, if desired, and when given, its terms are binding upon both parties, and will be enforced, if reasonable.<sup>3</sup> If the time be limited in the lay-over ticket in which the journey is to be resumed, then the company is not bound to carry on account of the old ticket, unless within the time thus limited.<sup>4</sup> But whether the passengers be carried with or without lay-over tickets, they have a right to be carried according to the grade of their tickets, if tickets are of different grades; and they, on their part, must abide by all reasonable rules of the company whilst in the cars.<sup>5</sup>

**18. Carrying passengers on freight trains.**—The law does not compel railroad corporations to carry passengers upon their freight trains, nor freight in their passenger coaches; it only requires them to carry both, but leaves it to such corporations to regulate the manner in which the same shall reasonably be done.<sup>6</sup>

It being a matter of choice with them whether, and upon what terms, they will carry passengers upon trains for freight, the right therefore devolves on themselves to fix the same, and it is held that it is not an unreasonable regulation that they shall only be carried on freight trains by procuring tickets before entering thereon.<sup>7</sup> If they fail to do so, they may be put off at the next

<sup>1</sup> *Barker v. N. York Cent. R. R. Co.*, *supra*.

<sup>2</sup> *Keeley v. Boston & Maine R. R. Co.*, 67 Me. 163, 16 Am. Ry. Rep. 339.

<sup>3</sup> *Churchill v. Chi. & Alton R. R. Co.*, 67 Ill. 390.

<sup>4</sup> *Churchill v. Chi. & Alton R. R. Co.*, 67 Ill. 390.

<sup>5</sup> *Churchill v. Chi. & Alton R. R. Co.*, 67 Ill. 390; Ill. Cent. R. R. Co. v. Johnson, 67 Ill. 312.

<sup>6</sup> Ill. Cent. R. R. Co. v. Nelson, 59 Ill. 110; Evans v. Memphis & Charles-

ton R. R. Co., 56 Ala. 246, 18 Am. Ry. Rep. 350.

<sup>7</sup> *Chicago & Alton R. R. Co. v. Flagg*, 43 Ill. 364; Ill. Cent. R. R. Co. v. Nelson, 59 Ill. 110; *Cleveland, C. & C. R. R. Co. v. Bartram*, 11 Ohio St. 457; *Law v. Illinois Central R. R. Co.*, 32 Ia. 534, 10 Am. Ry. Rep. 66; *Evans v. M. & C. R. R. Co.*, *supra*; *Burlington & Mo. River R. R. Co. v. Rose*, 11 Brown (Neb.), 177; S. C. 1 Am. & Eng. R. R. Cas. 253.

station, but not between stations.<sup>1</sup> The company may make and enforce rules against carrying passengers upon freight trains;<sup>2</sup> but if they hold themselves out to the public to carry passengers on such trains, then they are bound to carry accordingly, to the extent, and in the manner, in which they thus profess to the public an intent to carry, and must afford a reasonable opportunity to obtain tickets as in other cases, or else may not discriminate as for want of tickets.<sup>3</sup>

In New York the ruling is, that where freight trains are in the habit of carrying passengers, a person admitted thereon as a passenger, and treated as such, is entitled to all the rights of a passenger; and that the company incurs the same liability to such passenger for an injury received while being carried, as if it occurred on a regular passenger train.<sup>4</sup>

**19. A conductor's check is good only for the day on which it is given.**—The ordinary check of the conductor, given to a passenger in lieu of his ticket, and on which is designated the day and train upon which it is to be used, is good only for that day and train; and a passenger leaving a train voluntarily at a station, and entering another train of the same road, although it be going in the same direction, will have no right to be carried upon such check, but must pay his fare or produce a regular ticket, or else be liable to be put off the train.<sup>5</sup> Nor does it matter that the agent of the same company, at the station where he left the first train, informed him, on inquiry, that the check would be good until taken up; such agent is without power to bind the company in that respect.<sup>6</sup>

<sup>1</sup> Ill. Cent. R. R. Co. v. Nelson, 59 Ill. 110; Law v. Ill. Cent. R. R. Co., 32 Iowa, 534; Cleveland, C. & C. R. R. Co. v. Bartram, 11 Ohio St. 457. But see *contra*, B. & Mo. R. R. Co. v. Rose, *supra*. This rule, that passengers can only be ejected at stations, is a statutory one; in the absence of such a statute, the expulsion may be effected at any suitable place: *Ibid*.

<sup>2</sup> Ill. Cent. R. R. Co. v. Johnson, 67 Ill. 312; Evans v. M. & C. R. R. Co., *supra*.

<sup>3</sup> Ill. Cent. R. R. Co. v. Johnson, 67 Ill. 312; Evans v. Memphis & Charles-

ton R. R. Co., *supra*. It is not reasonable to afford such passengers no opportunity to procure tickets except at such hours as would make it more expeditious to travel by passenger trains: Evans v. M. & C. R. R. Co., *supra*.

<sup>4</sup> Edgerton v. The New York & Harlem R. R. Co., 39 N. Y. (12 Tiffany), 227.

<sup>5</sup> McClure v. The Phila., Wilmington & Baltimore R. R. Co., 34 Md. 532; S. C. 6 Am. R. 345.

<sup>6</sup> McClure v. P., W. & B. R. R. Co., *supra*.



20. **Sleeping cars.**—A sleeping car company is not responsible to its passengers, either as a carrier or as an innkeeper.<sup>1</sup> Its obligations are peculiar to the nature of its business, and are: to exclude improper persons from their sleeping cars, to provide passengers a berth, and to keep watch during the night to prevent the loss of the passengers' effects.<sup>2</sup> In case of loss, the company is liable for the value of such reasonable articles as a traveler usually carries, and for such a sum of money as may be reasonably necessary for his traveling expenses.<sup>3</sup>

<sup>1</sup> *Blum v. Southern Pullman Palace Car Co.*, 1 Flippin, 500; S. C. 9 Am. Ry. Rep. 321; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 9 Am. Ry. Rep. 328; *Welch v. Pullman Palace Car Co.*, 16 Abb. Pr., N. S., 352;

*Pfaelzer v. Same*, 4 Weekly Notes, 240; *Palmeter v. Wagner*, 11 Abb. Law J. 149.

<sup>2</sup> *Blum v. S. P. P. Car Co.*, *supra*.

<sup>3</sup> *Blum v. S. P. P. Car Co.*, *supra*.

## CHAPTER XLIX.

### BAGGAGE.

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**1. What the term includes.**—It is difficult to enumerate the articles that may be included, in each particular case, in the term baggage. This depends much upon the condition, habits and circumstances of life of the passenger.<sup>1</sup> Ordinarily it includes a trunk or trunks, with the necessary wearing apparel for both comfort and dress, suitable to the condition in life of the person; as also articles of the toilet, as brushes, combs, razors, and shaving apparatus; and likewise writing conveniences, and other articles of daily personal use and comfort;<sup>2</sup> also the necessary money for the journey;<sup>3</sup> and small articles of mere convenience, taste or pleasure, as opera glasses, gun, revolver, and hunting apparatus;<sup>4</sup>

<sup>1</sup> N. Y. Cent. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 21 Am. Ry. Rep. 428. It is a question for the jury: *Ibid.*

<sup>2</sup> Hawkins v. Hoffman, 6 Hill's R. 586; Davis v. Mich. Southern & N. Ind. R. R. Co., 22 Ill. 278; Toledo, Wabash & W. Ry. Co. v. Hammond, 33 Ind. 379.

<sup>3</sup> Hawkins v. Hoffman, 6 Hill's R. 586; Merrill v. Grinnell, 30 N.Y. 594; Jordan v. The Fall River R. R. Co., 5

Cush. 69.

<sup>4</sup> Hawkins v. Hoffman, 6 Hill's R. 586; Woods v. Devin, 13 Ill. 751; Davis v. M. S. & N. I. R. R. Co., 22 Ill. 278; Toledo, Wabash & W. Ry. Co. v. Hammond, 33 Ind. 379, 382. But it is held that a grocer, traveling into the country to purchase butter, can not recover for the loss of two revolvers: Chicago, Rock Island & Pacific R. R. Co. v. Collins, 56 Ill. 212, 4 Am. Ry. Rep. 453.

but not money in larger amount than for necessary expenses; nor articles of merchandise or of virtu, as paintings, statuary, antiquarian or geological specimens, or other articles not needed for the personal comfort or pleasure of the passenger during his journey, or absence from home in his character of traveler.<sup>1</sup> It has been held to include the surgical instruments of a surgeon;<sup>2</sup> the books of a student, and of a lawyer;<sup>3</sup> and valuable jewelry and miniatures as the baggage of a lady;<sup>4</sup> and also a watch.<sup>5</sup>

Notice in terms that trunks contain other than personal baggage is not necessary; the jury may infer such notice from all the circumstances.<sup>6</sup>

An attempt by a passenger to have an unreasonable amount of money carried among his baggage, as baggage, by concealment therein, or without making the same known to the company, is a fraud upon the company, and no responsibility will attach to

<sup>1</sup> *Hawkins v. Hoffman*, 6 Hill's R. 586; *Davis v. M. S. & N. I. R. R. Co.*, 22 Ill. 278; *Stimson and another v. Connecticut River R. R. Co.*, 98 Mass. 83. Nor to merchandise: *Miss. Cent. R. R. Co. v. Kennedy*, 41 Miss. 671.

<sup>2</sup> *Hannibal & St. Jos. R. R. Co. v. Swift*, 12 Wall. 274, 275.

<sup>3</sup> *Hopkins v. Westcott*, 6 Blatch. C.C. R., 64. But masquerade costumes in the trunks of their owner, and shipped to be used at their destination, are not personal baggage; and in order to render the company liable for delay in delivering them, they must have notice of their contents, and when they are to be used: *Michigan Southern & Northern Indiana R. R. Co. v. Oehm*, 56 Ill. 293, 4 Am. Ry. Rep. 451.

<sup>4</sup> *McGill v. Rowand*, 3 Penn. St. 452.

<sup>5</sup> *Jones v. Voorhees*, 10 Ohio, 146. And it is held in a case in Missouri, that for a small quantity of carpeting delivered with the baggage to the baggagemaster, although not checked as baggage, the company was liable, the passenger being assured by the baggageman that no check was necessary, and that it would go safely, al-

though, by rules unknown to the passenger, the baggageman was prohibited from receiving articles of freight to carry with ordinary baggage: *Minter v. Pacific R. R. Co.*, 41 Mo. 503. The ruling in this case was upon the principle that the company was bound by the action of its servant in the line of his vocation. Where merchandise other than ordinary baggage is received upon the payment of extra compensation, and there is no fraud practiced as to its nature, the company will be liable therefor as a common carrier: *Stoneman v. Erie Ry. Co.*, 52 N. Y. 429, 4 Am. Ry. Rep. 446; *Sloman v. Great Western Ry. Co.*, 67 N. Y. 208, 15 Am. Ry. Rep. 113.

<sup>6</sup> *Sloman v. Great Western Ry. Co.*, *supra*. And the owner is not required to declare the value of the baggage, unless requested, or unless he is attempting to forward merchandise as baggage: *Brown v. Camden & Atlantic R. R. Co.*, 83 Penn. St. 316, 15 Am. Ry. Rep. 421; *N. Y. Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 21 Am. Ry. Rep. 428.

it therefor.<sup>1</sup> In such case it is the duty of the passenger to report the same to the company, and pay such extra charges for its transportation as may justly be demanded.<sup>2</sup>

And whether the articles claimed to have been lost be proper or improper articles of baggage, yet the contradictory statements and conduct of the claimant may go far to destroy confidence in his testimony, when subsequently given upon the subject.<sup>3</sup>

Some of the authorities go further, and hold that, in addition to a passenger's own baggage, within the general description and definition of the term, he may also include, and recover for, if lost, articles of clothing, and various other articles, purchased by him when from home, and traveling without any other member of his family, for the use of such of his family or some of them who at the same time remain at home;<sup>4</sup> not including, however, uncut cloth for dresses purchased, and being carried in like manner in his trunk, for one not a member of his family.<sup>5</sup> But the doctrine thus avowed, as to the right so to include articles of clothing and other articles of or for those of his family, neither paying passage nor traveling with him, to our mind is unwarranted by legal authority. Personal baggage means baggage of the person who is the passenger. In the case here cited from 42 New York, the court even go so far in their admiration of judicial "progress," as to favor the recovery, under the claim of baggage, of whatever the carrier shall have received to carry as such—that is, for whatever may be in the trunks received to carry as baggage, within the given weight allowed for baggage by the custom of the carrier. This rule would not only tend to promote fraud and imposition, and result in compelling the company in all cases to examine the contents of passengers' trunks before accepting the same as baggage, to see if there be not other

<sup>1</sup> *Chi. & Aurora R. R. Co. v. Thompson*, 19 Ill. 578; *Davis v. Mich. Southern & N. Ind. R. R. Co.*, 22 Ill. 278; *Collins v. Boston & Maine R. R. Co.*, 10 Cush. 506. Evidence of conspiracy to charge the railroad company for the loss of a trunk is admissible: *Chicago, Rock Island & Pacific R. R. Co. v. Collins*, 56 Ill. 212, 4 Am. Ry. Rep. 453.

<sup>2</sup> *Davis v. M. S. & N. I. R. R. Co.*,

22 Ill. 278. And see *Brown v. Camden & Atlantic R. R. Co.*, 83 Penn. St. 316, 15 Am. Ry. Rep. 421.

<sup>3</sup> *Davis v. M. S. & N. I. R. R. Co.*, 22 Ill. 278.

<sup>4</sup> *Dexter v. Syracuse, Binghamton & N. Y. R. R. Co.*, 42 N. Y. 326; S. C. 1 Am. R. 527.

<sup>5</sup> *Dexter v. Syracuse, Binghamton & N. York R. R. Co.*, 42 N. Y. 326.

articles of value than baggage deposited therein, but would also, in the absence of such precaution of the carrier, enable the traveler to carry as baggage, and without cost, money, articles of virtue, or other property of small compass and light weight, to an unlimited value, without cost or freight, and without compensation to the carrier, and at the same time obtain full pay for the value thereof, if lost.<sup>1</sup>

Although live animals are not to be regarded as baggage of a passenger, yet if such animal, belonging to a passenger, be confided to the care of the baggageman of the train, when thereon, for carriage, and he consent to take charge of the same, the company will be accountable for the loss thereof, occasioned by the negligence or wrong act of the baggageman, notwithstanding there be a notice posted at the several stations that live animals are baggagemen's perquisites, if no special information thereof be brought home to the owner.<sup>2</sup>

**2. Liability of company for baggage; its check is evidence.**—Though railroad companies and other carriers are only responsible for injuries to passengers arising from the want of the utmost care on their part, or from the want of proper and safe road vehicles or coaches, or from the unsuitableness of employes, servants and agents having control or charge of the same, or for some other wrong, omission or neglect,<sup>3</sup> yet, as to the baggage of their passengers, in the absence of a special and legal contract to the contrary, they are absolutely liable for the safe delivery of the same to the owners on presentation of the proper check or authority to receive it, and in that respect are insurers, except as against the act of God, and the act of the public enemy.<sup>4</sup>

<sup>1</sup> 42 N. Y. 326.

<sup>2</sup> *Cantling v. Hannibal & St. Joe R. Co.*, 54 Mo. 385.

<sup>3</sup> *Camden & Amboy R. R. & Trans. Co. v. Burke*, 13 Wend. 611, 2 Am. R. W. Cas. 399. But where the baggage master of the road refuses to check baggage without the payment of extra compensation for overweight, and upon demand made refuses to return the baggage because it has been deposited in the car, and can not, without great trouble, be removed, and the baggage is sent forward, without the plaintiff, to the destination, where it

is destroyed by fire while in storage, it was held, the railroad company could not avail itself of the privileges of a common carrier in relation thereto: *McCormick v. Pennsylvania Central R. R. Co.*, 49 N. Y. 303, 4 Am. Ry. Rep. 429. It was assumed the acts of the baggage master were within his authority, and binding on the defendant; and there was a division of opinion among the judges as to whether the facts showed a conversion of the baggage in law: *Ibid.*

<sup>4</sup> 2 Kent's Comm., 527; *Sewall v. Allen*, 6 Wend. 335; *Camden & Am-*

The strict liability of a common carrier attaches to a railroad company for the baggage of its passengers confided to its care, and checked accordingly, during its passage, and for such reasonable time after its arrival at the place of destination, as to give the passenger an opportunity to call for the same.<sup>1</sup> What is a reasonable time is not an arbitrary matter of law, but must be left for determination in each particular case.<sup>2</sup> After such reasonable time, the liability of the company becomes that of warehousemen, and its liability as carrier ceases.<sup>3</sup>

boy R. R. & Trans. Co. v. Burke, 13 Wend. 611; Camden & Amboy R. R. & Trans. Co. v. Belknap, 21 Wend. 354, 2 Am. R. W. Cas. 496; Warner v. The Burlington & M. River R. R. Co., 22 Iowa, 166; Davis v. Mich. S. & N. Ind. R. R. Co., 22 Ill. 278; Dibble v. Brown & Harris, 12 Geo. 217; Wilson v. Chesapeake & Ohio R. R. Co., 21 Gratt. 654. And such, too, is the English rule: Macrow v. Great Western Ry. Co., Law Rep. 6 Q. B. 618; Cohen v. Southeastern Ry. Co., Law Rep. 2 Exch. Div., 253; Brooke v. Pickwick, 4 Bing. 218; Williams v. Great Western Ry. Co., 10 Exch. 15; Marshall v. York, Newcastle & Berwick Ry. Co., 11 Com. B. 655; Great Western Ry. Co. v. Goodman, 12 Ib. 313; Butcher v. London & Southwestern Ry. Co., 16 Ib. 13; Richards v. London, Brighton & South Coast Ry. Co., 7 Ib. 839. But see Stewart v. London & Northwestern Ry. Co., 3 H. & C. 135; Talley v. Great Western Ry. Co., Law Rep. 6 Com. P. 44. If the passenger stops off with his baggage by permission of the company, and again resumes his journey with the same baggage, and it be by the company received, the liability is renewed: Wilson v. Ches. & Ohio R. R. Co., *supra*. To restrict liability for baggage, there must be an actual agreement, or actual notice acquiesced in: *Ibid*. And a married woman may maintain her action

against the railway company for injury to her baggage, if such baggage is her separate property under the laws of the state in which she is domiciled, and the *lex loci* confers the right to sue. The *lex loci* has reference only to the remedy: Stoneman v. Erie Ry. Co., 52 N. Y. 429, 4 Am. Ry. Rep. 446.

<sup>1</sup> Burnell v. New York Cent. R. R. Co., 45 N. Y. 184; S. C. 6 Am. R. 61; Dininny v. New York & New Haven R. R. Co., 49 N. Y. (4 Sickels), 546; Bartholomew v. St. Louis, Jacksonville & Chi. R. R. Co., 53 Ill. 227; S. C. 5 Am. R. 45; Warner v. The B. & M. River R. R. Co., 22 Iowa, 166; Mote v. The Chi. & N. W. R. R. Co., 27 Iowa, 22, 26; Louisville, Cincinnati & Lexington R. R. Co. v. Mahan, 8 Bush (Ky.), 184; Patscheider v. Great Western Ry. Co., Law Rep. 3 Exch. Div., 153, 19 Am. Ry. Rep. 459.

<sup>2</sup> Burnell v. New York Cent. R. R. Co., 45 N. Y. 184; Mote v. The Chi. & N. W. R. R. Co., 27 Iowa, 22, 26; Louisville, Cincinnati & Lexington R. R. Co. v. Mahan, 8 Bush, 184. But from evening until the next morning is unreasonably long for a passenger to impose a carrier's liability on the company after arrival of the baggage: *Ib*.

<sup>3</sup> Roth v. Buffalo & S. L. R. R. Co., 34 N. Y. 548; Burnell v. New York Cent. R. R. Co., 45 N. Y. 184; Fairfax v. New York Central & Hudson River R. R. Co., 67 N. Y. 11, 15 Am.

In *Burnell v. The New York Cent. R. R. Co.*, above cited, the owner of the baggage applied for the same on the second day after his arrival at the place of its destination. It not being found, upon suit therefor, the court say: "It is unnecessary to attempt a definition of *reasonable time*, as applied to this subject in this case, because it is clear that sufficient time had elapsed to relieve the carrier from his peculiar liability as insurer of the property"; but that there "still remained a duty" on the part of the company to exercise ordinary care in keeping and preserving the property until called for, or disposed of according to law; and that this duty resulted from, and was a part of, the original contract or undertaking for the carriage of the property.<sup>1</sup>

But to exempt such carrier from strict liability as such, and change its relations into that of a warehouseman, the goods or baggage must not only arrive at the place of destination, and be there stored, if not called for, until a reasonable time has elapsed for the owner to call for them, but the storage must be in a safe and secure place, in the charge of careful and competent servants, ready to be delivered to the owner when called for. The same rule applies to the transportation, arrival and storage of baggage, as to ordinary freights.<sup>2</sup>

In *Bartholomew v. St. Louis, Jacksonville & Chicago Railroad Company*, the court, after referring to the cases of *Richards v. Michigan Southern & Northern Indiana Railroad Company*, and

Ry. Rep. 141; *Francis v. Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60; *Mote v. Chi. & N. W. R. R. Co.*, 27 Iowa, 22; S. C. 1 Am. R. 212; *Louisville, Cincinnati & Lexington R. R. Co. v. Mahan*, 8 Bush (Ky.), 184. A station agent has no power to bind the company by a contract for the storage of baggage, and the surrender of the check for such a purpose terminates the liability of the company: *Mattison v. New York Central R. R. Co.*, 57 N. Y. 552, 7 Am. Ry. Rep. 98. A failure to produce the baggage when called for, or to account for its disappearance, is *prima facie* evidence of negligence, which will not be

overcome by general proof of care exercised: *Fairfax v. N. Y. C. & H. R. R. R. Co.*, *supra*.

<sup>1</sup> *Burnell v. The New York Cent. R. R. Co.*, 45 N. Y. 184; *Warner v. The B. & M. River R. R. Co.*, 22 Iowa, 166; *Mote v. The Chi. & N. W. R. R. Co.*, 27 Iowa, 22, 26, 27.

<sup>2</sup> *Richards v. The Mich. S. & N. Indiana R. R. Co.*, 20 Ill. 404; *Porter v. The Chi. & Rock Island R. R. Co.*, 20 Ill. 407; *Chi., Rock Island & Pacific R. R. Co. v. Fairclough*, 52 Ill. 106; *Bartholomew v. St. Louis, Jacksonville & Chi. R. R. Co.*, 53 Ill. 227; S. C. 5 Am. R. 45.

of *Porter v. The Chicago & Rock Island Railroad Company*, above cited, say: "These cases all related to freight in its ordinary sense, as distinguished from baggage, which is usually taken with, and attends persons while traveling. But no difference is perceived between baggage given in charge of the company, and ordinary freight. In each case the company are paid to transport the property. On freight, the money is paid directly and simply for its transportation, while with baggage, the price paid for its transportation is included in the charge for the ticket the owner purchases for his transportation.<sup>1</sup> In each case the company becomes equally liable for its safe carriage and delivery, and are under the same responsibility for loss or injury it may sustain. It is true, the two different kinds of property are carried on different trains, but that can not matter, as their liability is in all respects the same. There being no difference in the duty or liability of the carrier in the two cases, they should be governed by the same rules." The court then add that "When defendants in error, therefore, transported the trunk to Delhi, to relieve themselves from the liability as common carriers, they should have stored the trunk in a safe and secure warehouse, and then the new relation of a warehouseman would have attached." And the burden of proof is upon the company to show such proper storage of the property; until this is made to appear, the company is not exonerated from the liability of a common carrier.<sup>2</sup>

The storage of baggage in a room or warehouse, in a window of which the glass is holden in only by tacks, the window being without any blinds, where entry is made through such window and the property taken, renders the common carrier liable as for an insecure manner of storing the property.<sup>3</sup>

The liability, as common carrier, for the loss or injury of baggage, only attaches where the carrier has exclusive possession thereof; therefore, railway companies are not liable in that char-

<sup>1</sup> *Wilson v. Grand Trunk R. W. of Canada*, 56 Maine, 60.

<sup>2</sup> *Bartholomew v. St. Louis, Jacksonville & Chi. R. R. Co.*, 53 Ill. 227, 231, 232. And in *Wilson v. Grand Trunk R. W. Co. of Canada*, the court say, APPLETON, Chief Justice: "The

fare for the passenger includes compensation for the carriage of his baggage, as to which the carriers of passengers are to be regarded as common carriers": 56 Maine, 60, 61.

<sup>3</sup> *Chicago, Rock Island & Pacific R. R. Co. v. Fairclough*, 52 Ill. 106.



acter for baggage retained by the passenger within his own control, but only for their actual negligence.<sup>1</sup> In *Tower v. Utica & Schenectady R. R. Co.*, just cited, the leading case in this country, the plaintiff left his overcoat in the cars at the end of his journey, having had it in his possession during the journey. The court held that there was no delivery to the carrier, and therefore it was not liable.<sup>2</sup> Whether different rules apply to steamboats than to other carriers is not entirely clear from the authorities, but the rule as here stated seems to be generally applied to them, on the same grounds as to railroads;<sup>3</sup> though a different rule prevails in New York.<sup>4</sup>

<sup>1</sup> *Talley v. Great Western Ry. Co.*, Law Rep. 6 Com. P. 44; *Le Conteur v. London & Southwestern Ry. Co.*, Law Rep. 1 Q. B. 54; *Bergheim v. Great Eastern Ry. Co.*, Law Rep. 3 C. P. Div. 221, 16 Am. Ry. Rep. 507; *Tower v. Utica & Schenectady R. R. Co.*, 7 Hill, 47.

<sup>2</sup> 7 Hill, 47. See, also, *First Natl. Bank of Greenfield v. Marietta & Cincinnati R. R. Co.*, 20 Ohio St. 259; *Grosvenor v. N. Y. Cent. R. R. Co.*, 89 N. Y. 34.

<sup>3</sup> *Abbott v. Bradstreet*, 55 Me. 530; *Clark v. Burns*, 118 Mass. 275; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302. And see *R. E. Lee*, 2 Abb. (U. S. C. C.), 49.

<sup>4</sup> *Mudgett v. Bay State St. Co.*, 1 Daly, 151; *Gore v. Norwich & N.Y. Transp. Co.*, 2 *Ib.* 254; *Macklin v. New Jersey S. Co.*, 7 Abb. Pr. (N. S.), 229; *Van Horn v. Kermit*, 4 E. D. Smith, 453. *Cohen v. Frost*, 2 Duer, 341, is questioned in the case first cited. See, also, *Gleason v. Goodrich Transp. Co.*, 32 Wis. 85; *McKee v. Owen*, 15 Mich. 115; *Walsh v. Steamboat H. M. Wright*, 1 Newb. 494. Under the English cases, some doubt has arisen as to what shall constitute such a delivery to the carrier as to charge him as such. In *Talley v. Great Western Ry. Co.*, *supra*, the plaintiff, having

had his portmanteau placed in the car with him, got off the train for refreshments, leaving the portmanteau in the cars. On returning to the train he was unable to find his car, and therefore took another. His portmanteau was delivered to him at the end of the journey, but its contents were missing. The jury having found the plaintiff negligent, the defendants were held not liable. In *LeConteur v. London & Southwestern Ry. Co.*, *supra*, a chronometer was lost under much similar circumstances. The defendant was held not liable under the Carriers' Act; but *COCKBURN*, C. J., said: "I think the circumstances must be strong to relieve the company from their liability; it is not because the article that is part of the passenger's luggage to be conveyed with him is, by the joint consent of the passenger and the company, placed in a carriage with him, that the company are necessarily released from their obligation to carry safely." L. R. 1 Q. B. 59. But the more recent case of *Bergheim v. Great Eastern Ry. Co.*, *supra*, affirms the position taken in the *Talley* case. See, also, in this connection, *Butcher v. London & Southwestern Ry. Co.*, 16 Com. B. 13; *Richards v. London, Brighton & South Coast Ry. Co.*, 7 Com. B. 839.

### 3. Liability not avoided by notice on back of the ticket.—

But whatever the effect of notice of terms of shipment may be, when clearly brought home to the knowledge of the consignor at the time of the consignment, mere notice or conditions printed on the back of a passenger ticket, as to limited liability for baggage, will not bind the passenger, or relieve the carrier from the common law liability. The presumption of law will not arise therefrom that the passenger had notice thereof, or read the same at the time of receiving the ticket. In such case the ticket is only expected to secure the transportation of the passenger, and is liable to be exchanged for the conductor's check in an early stage of the passage, and, moreover, is not designed to be retained for future use, as evidence of a contract for the transportation of the passenger's baggage; hence the passenger is not bound to observe or read it, nor is he bound by the inscription which may be printed on its back.<sup>1</sup> In most cases the hurried manner of issuing such tickets leaves no time for examination; and if it did, the passenger is not bound to reject it, and run the risk of exclusion from the departing cars, nor to receive it subject to such limitations and disparaging conditions.

In Pennsylvania, the notice on the ticket is sufficient, if any were required. It is the settled doctrine in that state, as stated by STRONG, Justice, in *Pennsylvania Cent. Railroad Company v. Schwarzenberger*, that even over its own route, a railroad company may limit its liability for the baggage of a passenger, by a general notice that the baggage is at the risk of the owner (except as against the want of ordinary care of the company), provided the terms of the notice are clear and explicit, and provided that knowledge of such notice be brought home to the passenger.<sup>2</sup> The company may not, however, by such notice, release itself from responsibility arising from want, on its part, of ordinary care.<sup>3</sup>

<sup>1</sup> *Brown v. Eastern R. R. Co.*, 11 Cush. 97; *Malone v. The Boston & Worcester R. R. Co.*, 12 Gray, 388; *Mobile & Ohio R. R. Co. v. Hopkins*, 41 Ala., N. S., 486; *Rawson v. Pennsylvania R. R. Co.*, 48 N. Y. 212; *Camden & Amboy R. R. & T. Co. v. Belknap*, 21 Wendell (N. Y.), 354.

<sup>2</sup> *Beckman v. Shouse*, 5 Rawle, 189; *Bingham v. Rogers*, 6 W. & S. 500; *Laing v. Colder*, 8 Penn. St. 484; *Pennsylvania Cent. R. R. Co. v. Schwarzenberger*, 45 Penn. St. 208, 215.

<sup>3</sup> *Pennsylvania Cent. R. R. Co. v. Schwarzenberger*, 45 Penn. St. 208, 215.

**4. Through checks for baggage on connecting, but independent, lines.**—The purchaser of a through ticket over several connecting, but not united, lines, who checks his baggage through over said lines, is entitled to recover for the loss thereof only from the company upon whose line it is lost;<sup>1</sup> and in an action for such loss, if the loss only, and no more, appear, and not on what line, then no matter against which of said companies the action be, no recovery can be had; for to charge either one of said lines therewith, it must appear that the loss occurred thereon.<sup>2</sup> In such cases of sales of through tickets over independent lines of road, the vendor of the tickets of the connecting lines, and the baggage master in checking over such connecting lines, at one and the same place and time, when the ticket is purchased and the passenger embarks, act as but the agents, and not as officers, of such connecting lines, and in order to hold each or either of them in turn responsible for the baggage if lost, it must appear from the evidence that it was lost on such line, or that it came to the possession thereof, and is not produced or properly accounted for.<sup>3</sup>

The ordinary obligation of a railroad company to carry a passenger's baggage extends to no greater distance than its obligation is to carry the passenger himself, and extends no further as to other lines of road.<sup>4</sup> The baggage is not freight, and therefore no insurance of absolute safety attaches, nor any liability at all beyond the company's own line, unless expressly assumed; none arising by mere implication, although a through ticket be sold over the connecting line.<sup>5</sup> If by implication there could be, a notice to the contrary endorsed on the ticket will repel such implication.<sup>6</sup> A company is ordinarily a common

<sup>1</sup> Chicago & Rock Island R. R. Co. v. Fahey, 52 Ill. 81; S. C. 4 Am. R. 587; Phila., Wil. & Balt. R. R. Co. v. Harper, 29 Md. 339; Kessler v. New York Central & Hudson River R. R. Co., 61 N. Y. 538, 12 Am. Ry. Rep. 134; Furstenheim v. Memphis & Ohio R. R. Co., 9 Heisk. 238, 19 Am. Ry. Rep. 409.

<sup>2</sup> Chicago & Rock Island R. R. Co. v. Fahey, 52 Ill. 81; Kessler v. N. Y. Cent. & H. R. R. R. Co., *supra*.

<sup>3</sup> Chicago & Rock Island R. R. Co.

v. Fahey, 52 Ill. 81; S. C. 4 Am. Rep. 587; Kessler v. N. Y. Cent. & H. R. R. R. Co., *supra*; Furstenheim v. M. & O. R. R. Co., *supra*.

<sup>4</sup> Pennsylvania Cent. R. R. Co. v. Schwarzenberger, 45 Penn. St. 208, 214, 215.

<sup>5</sup> Pennsylvania Cent. R. R. Co. v. Schwarzenberger, 45 Penn. St. 208, 214, 215.

<sup>6</sup> Pennsylvania Cent. R. R. Co. v. Schwarzenberger, 45 Penn. St. 208, 214, 215.

carrier over only its own line; beyond that, the passenger must look, for the safety of himself and baggage, to the line on which he proceeds, if the line be only a connecting line, and no express obligation thereon is assumed by the first company.<sup>1</sup>

Though the baggage check of a railroad company is sufficient evidence of the receipt of the baggage by the company, yet it is only *prima facie* so, and may be rebutted and overcome by proof.<sup>2</sup> And it is immaterial whether the baggage come to the hands of the company before or after the giving of the check, if the company actually came into the possession thereof, as contemplated when the check is given; as, for instance, if the check be given in exchange for the check of another road, on which the baggage is at the time, and in view of obtaining the baggage by virtue thereof, and the company do so obtain it, its liability is thereby fixed.<sup>3</sup> The inference arising from such circumstance of exchanging checks, is that the company, on the check being so received by it, received and got possession of the baggage of the passenger; and though not liable therefor if it did not, yet the burden of proof rests upon it to show that the baggage never came to its hands, and that the failure was not its fault.<sup>4</sup> But such presumption against, and liability of, a railroad company, does not arise in case the company only undertake to do a friendly act to the holder of the check by accepting the same, and nothing more, if there be no misconduct of the company conducive to the loss.<sup>5</sup>

**5. Distinction as to recovery against connecting lines and united continuous lines.**—There is a necessary distinction between the right of the holders of through tickets over continuous lines operating as one united line, and holders of tickets over continuous connecting lines, to recover for baggage lost in the course of transportation, although in both cases the baggage be checked clear through at the office where it is embarked, and the passenger takes his passage. In the former case, each is responsible for the whole, as the whole compose but one line; <sup>6</sup>

<sup>1</sup> Pennsylvania Cent. R. R. Co. v. Schwarzenberger, 45 Penn. St. 208, 214, 215.

<sup>2</sup> Davis v. Mich. S. & N. Ind. R. R. Co., 22 Ill. 278; Chi., Rock Isl. & P. R. R. Co. v. Clayton, 78 Ill. 616.

<sup>3</sup> Chi., Rock Isl. & P. R. R. Co. v.

Clayton, 78 Ill. 616.

<sup>4</sup> Chi., Rock Isl. & P. R. R. Co. v. Clayton, 78 Ill. 616.

<sup>5</sup> Mich. S. & N. Ind. R. R. Co. v. Meyres, 21 Ill. 627.

<sup>6</sup> Barton & Co. v. Wheeler, 49 N. H. 9.

whereas in the latter, each line runs independently of any other connection with the other than that of receiving the persons and baggage that arrive from one to the other, and the responsibility then is for that which occurs on its own line only.<sup>1</sup>

It is well settled that where a railroad company, acting as a common carrier, have a general agent expressly employed in the receipt and transportation of property over its lines, and who is held out to the public as clothed with such authority, then if goods be delivered to him for transportation as such agent, and in the way of his duty, the company are liable for the manner in which that duty is performed.<sup>2</sup> But if such property to be transported be the baggage of a passenger, and it be subsequently forwarded over the road from a connecting road, over which the owner in his route has passed, and on which latter it was temporarily lost, then when delivered for carriage to the company over whose road the owner has passed without baggage, it is not entitled to go over the same free, and as baggage, but as freight only, there being no owner accompanying it on its passage over the latter road.<sup>3</sup> In thus passing over the latter road as freight, the company may either require the freight to be paid in advance, or, relying on the carrier's lien or the responsibility of the owner, may waive payment in advance, and defer the same to the time of delivery of the property, after the transportation thereof is completed. In either case, the actual payment of such freight, in the one, and the liability to pay and lien for its payment, in the other, as the case may be, affords sufficient consideration for the undertaking, and if lost, the company will be liable therefor; for by delivery to, and acceptance by, the ordinary agent of the company for transportation, the company becomes liable in like manner as on the delivery and acceptance of any other parcel or article of freight, as a common carrier, for the faithful and safe carriage of the same. If no claim for advance payment be made, then the duty of common carrier devolves upon the company to carry it, and look to their

<sup>1</sup> *Chicago & Rock Island R. R. Co. v. Fahey*, 52 Ill. 81; S. C. 4 Am. R. 587; *Furstenheim v. Memphis & Ohio R. R. Co.*, 9 Heisk. 238, 19 Am. Ry. Rep. 409.

<sup>2</sup> *Wilson v. The Grand Trunk R. W. Co.*, 57 Maine, 138; S. C. 2 Am. R.

26; *Mayall v. Boston & Maine R. R. Co.*, 19 N. H. 122.

<sup>3</sup> *Wilson v. Grand Trunk R. W. Co.*, 56 Maine, 60; *Wilson v. Grand Trunk R. W. Co.*, 57 Maine, 138; *Elkins v. Boston & Maine R. R. Co.*, 23 N. H. 287.

lien for their pay; and in such case there is an implied contract to transport the same, arising from its acceptance for carriage. If, on the other hand, payment be made in advance, then the contract is an express one; but the obligation in either case is the same.<sup>1</sup>

Where several railroads join in issuing excursion tickets, and in getting up an excursion over their roads, and severally issue tickets for the whole route, a passenger holding a ticket over the same is entitled to have his ordinary baggage carried through by virtue of such ticket, free of any further charge; and if the company on whose train such passenger embarks receives the baggage of the passenger, but gives no check in exchange therefor, and it be lost, then such one of the companies engaged in carrying out the excursion which received the baggage, is liable in an action for the same, no matter on which of the several lines it be lost. The refusal to deliver a check, on the pretext that the owner was going through on the same train with his baggage, and the silent acquiescence of the passenger, will not alter the case; nor will the fact that the baggage master goes through on the same train. Where the statute requires checks to be given for baggage, the refusal thereof is a violation of the law, and the party refusing is liable for the loss.<sup>2</sup>

**6. Limitation of liability by notice or by contract.**—Nor will a notice brought home to the knowledge of the passenger, or even an agreement, to the effect that all goods or baggage are carried at the owner's risk, excuse the company from liability for losses occasioned by the negligence, fraud or other misconduct of the company or its servants, or from the insufficiency of its machinery or vehicles.<sup>3</sup> And where baggage is left with a

<sup>1</sup> *Wilson v. The Grand Trunk R. W. Co.*, 57 Maine, 138; S. C. 2 Am. R. 26.

<sup>2</sup> *Najac v. Boston & Lowell R. R. Co.*, 7 Allen, 329.

<sup>3</sup> *Camden & Amboy R. R. & Trans. Co. v. Burke*, 13 Wend. 611; S. C. 2 Am. R. W. Cas. 399; *Camden & Amboy R. R. & Trans. Co. v. Belknap*, 21 Wend. 354; *Logan v. Pontchartrain R. R. Co.*, 11 Robinson (La.), 24. But it is competent for railroads to protect themselves against liability exceeding a fixed amount, except upon

additional compensation: *N. Y. Cent. & H. R. R. R. Co. v. Fraloff*, 100 U. S. 24, 21 Am. Ry. Rep. 428. And if the passenger, by any device or artifice, evades inquiry as to the value of the baggage, they may be discharged from liability for the full value: *Ibid.* But in the absence of legislation, regulations of the carrier, or such misleading conduct, his failure to disclose the value, when no inquiry is made of him, is not in itself fraud: *Ibid.*

servant of the company, and by him locked up in an office or room at which the company are accustomed to receive the baggage of passengers for safe keeping until the time of leaving, and is thus left by one designing to take passage with the company, the law deems it to be in the hands of the company as common-carriers, and they are accountable for its loss.<sup>1</sup>

**7. Through checks upon continuous lines.**—Railroad companies selling through tickets to passengers, and checking their baggage, over their own line and a continuous line or lines, become thereby liable for the safe carriage of the baggage all the way through, and for its arrival and delivery at the place of final destination.<sup>2</sup>

Through checks for baggage given by one of several companies of a continuous line of railroads, renders the company receiving the baggage and issuing the check liable for the baggage all the way through;<sup>3</sup> and if there be a privilege of re-checking it on a line other than one of the continuous lines designated in the passenger's ticket, and it be so re-checked, and the original check be surrendered, yet the original liability of the first carrier is not thereby released, but continues over the latter line.<sup>4</sup> To hold the latter line liable for the baggage so re-checked over it, there must be a showing of loss by negligence on its part, as its re-checking is deemed but an act in part fulfillment of the original contract of through carriage, done by the latter as agent for the first company, and not a new or separate undertaking of the latter company, which latter is only liable, therefore, for loss caused by its own negligence.<sup>5</sup>

**8. Detention of owner by reason of damage to baggage.**—The statute of Iowa, giving an action to passengers against common carriers for damage to baggage or other property of travelers through careless or negligent handling of the same, and a stipulated penalty of three dollars for each day's detention occasioned to such travelers by reason of such damage,

<sup>1</sup> Camden & Amboy R. R. & Trans. Co. v. Belknap, 21 Wend. 354.

<sup>2</sup> Illinois Cent. R. R. Co. v. Copeland, 24 Ill. 332.

<sup>3</sup> Candee v. Penn. R. R. Co., 21 Wis. 582; Hood v. N. Y. & N. Haven R. R. Co., 22 Conn. 1; Sprague v. Smith,

29 Vt. 426; Schopman v. Boston & W. R. R. Co., 9 Cush. 24; Ill. Cent. R. R. Co. v. Copeland, 24 Ill. 332.

<sup>4</sup> Candee v. Penn. R. R. Co., 21 Wis. 582.

<sup>5</sup> Candee v. Penn. R. R. Co., 21 Wis. 582.

is held by the supreme court of that state not to apply to a case of mere delay in carriage, or detention of baggage, but to such detention of the owner as accrues in "consequence" of such damage to the baggage. Cases of mere detention of baggage are not within the statute.<sup>1</sup> Detention of the owner may be for purposes of repair of baggage so damaged, or for the prosecution of the action given by the statute for damages to baggage; and such detention of the owner is the detention contemplated by the statute.

**9. Testimony of the owner as to lost baggage.**—In an action for lost baggage, the owner is a competent witness, from necessity, at common law, to prove the contents of the trunk, or other thing containing the baggage, and also the description thereof; but can not testify to the value. This latter proof may be made always by disinterested persons, who are acquainted with the value of such articles, and who may usually be found in every community.<sup>2</sup> And the owner thus being competent, so is his wife.<sup>3</sup>

It follows that, except in those states wherein by statute parties are allowed to testify generally in their own cases, the owner of lost baggage may not be a witness for himself to prove the value of the trunk, or other receptacle in which the baggage is carried. It is not a necessity. His evidence can go no further than to describe the same; and when described, any dealer in the article may prove the value thereof.<sup>4</sup>

In the case of *Parmelee v. McNulty* the court say: "the law permits a party to be a witness in his own cause, for the purpose of proving the contents of lost baggage, and even its value, where he can not adduce other evidence of these facts"; but that "This is an exception to the general rule of law, and should not be extended beyond the necessity which gave rise to it."<sup>5</sup> In some of the states, the owner may by statute not only swear to the con-

<sup>1</sup> *Anderson v. The Toledo, Wabash & Western R. R. Co.*, 32 Iowa, 86.

<sup>2</sup> *Parmelee v. McNulty*, 19 Ill. 558; *Davis v. Mich. South. & N. Indiana R. R. Co.*, 22 Ill. 281; Ill. Cent. R. R. Co. *v. Taylor*, 24 Ill. 323; *Illinois Cent. R. R. Co. v. Copeland*, 24 Ill. 332; *Mad River & Lake Erie R. R. Co. v. Fulton*, 20 Ohio, 313.

<sup>3</sup> *Mad River & Lake Erie R. R. Co. v. Fulton*, 20 Ohio, 313.

<sup>4</sup> *Parmelee v. McNulty*, 19 Ill. 558; *Davis v. M. S. & N. I. R. R. Co.*, 22 Ill. 278.

<sup>5</sup> *Parmelee v. McNulty*, 19 Ill. 558; *Davis v. M. S. & N. I. R. R. Co.*, 22 Ill. 281.



tents and description of articles contained in the trunk or other vehicle lost, but also to the value thereof, subject to rebuttal by evidence of others, as in ordinary cases of rebutting evidence;<sup>1</sup> so also, in those states where, in all cases, parties to civil actions and suits are competent in law to testify in their own behalf.

**10. Baggage as freight, passing without the owner.**—The mere delivery of a trunk to a railroad company, or to its baggage master, to be carried over the company's road, accompanying the delivery with a statement that the owner of the trunk had passed over the road, will not fix upon the company in itself the obligation to carry the trunk as baggage, and free of charge;<sup>2</sup> but a trunk, as well as other property, may be sent as ordinary freight, and if delivered for carriage to a railroad company under such circumstances as does not entitle it to go over the road as baggage, yet if received by the company, it should be forwarded as freight, and a charge made and collected therefor on delivery at its place of destination.<sup>3</sup> For a trunk thus delivered to and lost by a railroad company, the company are liable as common carriers; and it does not alter the case that nothing was paid for carriage, where advanced payment was not claimed when the trunk was delivered to the company.<sup>4</sup>

**11. Lien on baggage for fare of passenger.**—The law gives the company a lien on a passenger's baggage, when in the company's possession, for the passenger's fare, and it may be held for payment by virtue of the lien; but if broken open or robbed whilst so detained, the company are liable for the loss, and this, too, irrespective of the question as to whether it is retained with or without the consent of the owner.<sup>5</sup>

<sup>1</sup> *Nolan v. Ohio & Miss. R. R. Co.*, 39 Mo. 114.

<sup>2</sup> *Wilson v. Grand Trunk R. W. Co.*, 57 Maine, 138; *Graffam v. Boston & Me. R. R. Co.*, 67 Me. 234; S. C. 5 Repr. 44, 15 Am. Ry. Rep. 572.

<sup>3</sup> *Wilson v. Grand Trunk R. W. of Canada*, 56 Maine, 60; *Wilson v. Grand Trunk R. W. Co.*, 57 Maine,

138; *Graffam v. B. & M. R. R. Co.*, *supra*.

<sup>4</sup> *Wilson v. Grand Trunk R. W. Co.*, 57 Maine, 138; *Graffam v. B. & M. R. R. Co.*, *supra*.

<sup>5</sup> *Southwestern R. R. Co. v. Bently*, 51 Ga. 311; S. C. 6 Am. R. W. Rep. 354.

## CHAPTER L.

### BELL RINGING, WHISTLING AND OTHER WARNINGS.

	Section.		Section.
Not intended for persons walking		whistle may be negligence,	
longitudinally on railroads	1	though not required by statute	3
The omission thereof, when re-		Other ordinary care must also be	
quired by law	2	observed	4
Omission to ring bell or sound			

**1. Not intended for benefit of persons walking longitudinally on railroads.**—The law requiring the bell to be rung upon locomotive engines in approaching to and crossing public road crossings, is not enacted for the benefit or warning of persons walking on the track of a railroad company, along such track, not in or on a public highway; but is meant exclusively for the protection of persons about to cross the railroad at public crossings.<sup>1</sup> Neither is it intended for the protection of passengers taking or leaving trains.<sup>2</sup>

And where, in Rhode Island, a person thus walking along the private track of a railroad company, at a place where the company had the exclusive right of the road, was injured, it was holden by the supreme court of that state that he could not recover against the company for the injury, although it occurred

<sup>1</sup> O'Donnell v. The Providence & Worcester R. R. Co., 6 Rhode Isl. 211, 217; Harty v. Cent. R. R. Co. of N. J., 42 N. Y. 468; Voak v. Northern Cent. Ry. Co., 75 N. Y. 320. It is otherwise in Tennessee by statute: Hill v. Louisville & Nashville R. R. Co., 9 Heisk. 823, 19 Am. Ry. Rep. 400. But the statute does not apply as between the company and its employes at yards and stations: Louisville & Nashville R. R. Co. v. Robertson, *Id.* 276, 20 Am. Ry. Rep. 9. Under this statute it is held it is the duty of the engi-

neer to keep a lookout ahead, but not behind, and to ring the bell or sound the whistle at crossings; but if there is nothing on the track ahead, he need not continue such signals. If the person on the track can be seen, the statute requires that every possible means shall be used to stop the train; but if concealed from view, the omission of the statutory requirements is not negligence: Moran v. Nashville & Chattanooga R. R. Co., 58 Tenn. 379, 21 Am. Ry. Rep. 192.

<sup>2</sup> Terry v. Jewett, 78 N. Y. 338.

near to a public crossing, and within such distance thereof as the bell was by law required to be rung when approaching the crossing.<sup>1</sup> The court held that the duty imposed by the statute, as to ringing the bell, being one imposed for the benefit of those in the legitimate act of crossing, was not intended for the benefit of the injured person, who received his injury walking along on the road elsewhere than at the crossing; and that to recover, the injury must have proceeded from the neglect of "some duty or obligation due to him who claims damages for the neglect."<sup>2</sup>

It is held in Massachusetts that the statute requiring railroad corporations to carry bells on their engines, and to cause the same to be rung at and in the approach to public road crossings, applies as well to lessees operating the railroad of another corporation as to the owners of such roads when operating them themselves.<sup>3</sup>

In New York, a statute requiring railroad companies to keep a bell or steam whistle upon their engines, and to cause the bell to be rung or the whistle to be sounded "at the distance of at least three hundred yards from the place where any such railroad crosses a turnpike road, or highway, upon the same level with the said railroad"; and requiring that "such bell shall be kept ringing, or such steam whistle shall continue to be blown, until the engine has crossed such turnpike or highway, or has stopped," is held not to apply to places other than road crossings, and is not intended for persons traveling on or crossing the railroads of said state elsewhere than at public crossings.<sup>4</sup> And such seems to be the current of authority. The Court of Appeals of that state say, EARL, Chief Justice: "The sole object of this law, it seems to me, was to protect persons traveling upon the highway, at or near the crossing. In the language of ALLEN, J., in *The People v. New York Central Railroad Co.* (25 Barb. 199), in reference to a similar law of

<sup>1</sup> *O'Donnell v. The Providence & Worcester R. R. Co.*, 6 Rhode Isl. 211, 214, 217.

<sup>2</sup> *O'Donnell v. The Providence & Worcester R. R. Co.*, 6 Rhode Isl. 214, 217; 1 Comyn's Dig., Action on Statute, letter F.

<sup>3</sup> *Linfield v. Old Colony R. R. Co.*,

10 Cush. 562; *Davis v. Prov. & Worcester R. R. Co.*, 121 Mass. 134. See *Pierce v. Concord R. R. Co.*, 51 N. H. 590; *Hall v. Brown*, 54 N. H. 495; S. C. 58 N. H. 93.

<sup>4</sup> *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468.

this state, "the hazards to be provided against were two-fold: 1st. The danger of actual collision at the crossing; and, 2d. That of damage by the frightening of teams traveling upon the public highway," "near the crossing."<sup>1</sup> The court, as a reason for such ruling, refer to the fact that by such statute railroad companies were not required to use these precautions where the highway passed along the railroad, nor where it passed at an elevation over it or under it; nor were they required to take these precautions for the protection of persons walking along upon the railroad.<sup>2</sup>

From these principles it clearly results that a failure to resort to these measures of warning at places other than crossings is not legal negligence, as for want of statutory compliance. But it is equally clear that, while the want of such warnings on the part of railroad companies is not legal negligence resulting from non-compliance with positive legal requirements, nevertheless the rule of law that requires of the company ordinary care under all circumstances to avoid injury to others, may render the giving of these warnings necessary, as a matter of reasonable care, at times and places not required by express law.<sup>3</sup> This, however, depends upon the circumstances of the case.

**2. The omission thereof, when required by law.**—When by law bell ringing and sounding the whistle are required in approaching and passing over public road crossings, the omission thereof amounts to actual negligence on the part of the company.<sup>4</sup>

<sup>1</sup> *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468, 471.

<sup>2</sup> *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468, 471.

<sup>3</sup> *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468, 472; *Schultz v. Chicago & Northwestern Ry. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146; *Ditberner v. Chicago, Milwaukee & St. Paul Ry. Co.*, 47 Wis. 138, 21 Am. Ry. Rep. 37.

<sup>4</sup> *Reynolds v. Hindman*, 32 Iowa, 146; *Artz v. The Chi., R. Isld. & P. R. R. Co.*, 34 Iowa, 153; *Dodge v. The Burlington, C. R. & M. R. R. Co.*, 34 Iowa, 276; *Steves v. The Oswego & S. R. R. Co.*, 18 N. Y. 422; *Havens v. The Erie Ry. Co.*, 41 N. Y. 296;

*Cordell v. N. Y. Cent. & H. R. R. R. Co.*, 64 N. Y. 535; *S. C. 70 N. Y. 119*, and 6 Hun, 461; *Bradley v. Boston & Maine R. R. Co.*, 2 Cush. (Mass.), 539; *Galena & Chi. Union R. R. Co. v. Loomis*, 13 Ill. 548; *Chi. & Rock Isl. and R. R. Co. v. Reid*, 24 Ill. 144; *Chi. & Alton R. R. Co. v. Henderson*, 66 Ill. 494; *Dimick v. Chi. & N. W. Ry. Co.*, 80 Ill. 338; *Peoria, Pekin & Jacksonville R. R. Co. v. Siltman*, 88 Ill. 529, 21 Am. Ry. Rep. 352; *Memphis & Charleston R. R. Co. v. Copeland*, 61 Ala. 376. It is a question for the jury whether the signals are given: *Warner v. New York Central R. R. Co.*, 52 N. Y. 437, 4 Am. Ry. Rep.

But such omission and negligence does not render the company liable for injuries received at such crossings, unless the omission be the cause thereof, or contribute thereto, without contributory negligence of the injured party, if in those states where the doctrine of contributory negligence prevails;<sup>1</sup> and

516; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Cosgrove v. N. Y. Cent. & H. R. R. Co.*, 13 Hun, 329; *Byrne v. Same*, 14 Hun, 322; *Sutherland v. Same*, 41 N. Y. Supr. 17; *Peoria, Pekin & Jacksonville R. R. Co. v. Siltman*, 88 Ill. 529; S. C. 21 Am. Ry. Rep. 352; *Eilert v. Green Bay & Minn. R. R. Co.*, 48 Wis. 606; S. C. 10 Cent. L. J. 316. And the positive testimony of witnesses that the signals are not given, is not negative evidence: *Chicago, Burlington & Quincy R. R. Co. v. Lee*, 87 Ill. 454, 18 Am. Ry. Rep. 378. And an instruction that the positive testimony of one witness outweighs the testimony of any number of negative witnesses, is properly refused: *Savannah & Memphis R. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451. See also *Urbanek v. Chicago, Milwaukee & St. Paul Ry. Co.*, 47 Wis. 59, 21 Am. Ry. Rep. 58; *Chicago, Burlington & Quincy R. R. Co. v. Dickson*, 88 Ill. 431, 21 Am. Ry. Rep. 328; *Voak v. N. Cent. Ry. Co.*, 75 N. Y. 320. The general rule is, however, that positive testimony is entitled to greater weight than negative testimony: *Rockford, Rock Island & St. Louis R. R. Co. v. Byam*, 80 Ill. 528; *Chapman v. N. Y. Cent. & H. R. R. Co.*, 14 Hun, 484. And so, where such signals are required to warn persons on the track: *Hill v. Louisville & Nashville R. R. Co.*, 9 Heisk. 823, 19 Am. Ry. Rep. 400.

<sup>1</sup> *Reynolds v. Hindman*, 32 Iowa, 146; *Dodge v. Burlington, Cedar Rapids & Minnesota R. R. Co.*, 34 Ia. 276; *Artz v. The Chi., R. Isld. & P. R. R. Co.*, 34 Iowa, 153; S. C. 38 Ia. 293, and 44 Ia. 284; *Payne v. Chicago,*

*Rock Island & Pacific Ry. Co.*, 39 Ia. 523, 9 Am. Ry. Rep. 176; S. C. 44 Ia. 236; *Lang v. Holiday Creek R. & C. M. Co.*, 49 Ia. 469; *Steves v. The Oswego & S. R. R. Co.*, 18 N. Y. 422; *Brown v. Buffalo & St. Line R. R. Co.*, 22 N. Y. 191; *Wilcox v. The Rome, W. & O. R. R. Co.*, 39 N. Y. 358; *Havens v. The Erie Ry. Co.*, 41 N. Y. 296; *Briggs v. N. Y. Cent. & H. R. R. Co.*, 72 N. Y. 26; *Cosgrove v. Same*, 13 Hun, 329; *Barringer v. Same*, 18 Hun, 398; *Pakalinsky v. Same*, 82 N. Y. 424; *Memphis & Charleston R. R. Co. v. Bibb*, 37 Ala. 699; *Chicago & Alton R. R. Co. v. McDaniels*, 63 Ill. 122; *Chi., Bur. & Quincy R. R. Co. v. Van Patten, admr.*, 64 Ill. 510; *Chi. & Alton R. R. Co. v. Henderson*, 66 Ill. 494; *Toledo, Wabash & Western Ry. Co. v. Jones*, 76 Ill. 311; *Same v. Durkin*, *Id.* 395; Ill. Cent. R. R. Co. *v. Hetherington*, 83 Ill. 510; *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 90 Ill. 425; *Lake Shore & Mich. Southern Ry. Co. v. Clemens*, 5 Bradw. (Ill.), 77; *Leavenworth, Lawrence & G. R. R. Co. v. Rice*, 10 Kans. 426; *Meeks v. Southern Pacific R. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115; *Dublin, W. & W. Ry. Co. v. Slattery*, Law Rep. 3 App. Cas. 1155; S. C. Irish Rep., 8 C. L. 531, and 10 *Id.* 256; *Houston & Tex. Cent. R. R. Co. v. Nixon*, 52 Tex. 19; *Harlan v. St. Louis, Kansas City & Northern R. R. Co.*, 64 Mo. 480; *Zimmerman v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 476; S. C. 11 Cent. Law J. 96. And the rule is the same though the plaintiff at the time of the accident be a passenger in the vehicle of another: *Payne v. C., R. I. & P. Ry. Co.*, *supra*.

without that degree of comparative negligence which prevents a party from recovering in those states, as in Illinois and Georgia, wherein the rule of comparative negligence is recognized and enforced.<sup>1</sup> But if the negligence be all on the part of the company, and the injury result from such unmixed negligence, then the company are liable therefor, whether such negligence consist in omitting to ring the bell or sound the whistle, or in other acts or omissions, or in each. To this point no authorities need be cited.

If warning boards or signs be not placed up at public crossings in Massachusetts, as required by the statute, the company are for such omission chargeable, in that respect, with negligence; but to enable the plaintiff to make proof of such omission, a foundation for such evidence must be laid by an averment of such omission in the petition or declaration.<sup>2</sup> If there be a verdict for the plaintiff, based on proof of omitting to fence, when no such averment is made in the petition or declaration, the verdict will be set aside, and leave will be given to amend.

The statute requirement of signals is not for the benefit of such passengers taking or leaving the train at the depot.<sup>4</sup>

Proof of a violation of the statute and an injury is not sufficient;<sup>5</sup> there must be proof connecting the one with the other.<sup>6</sup> Whether the failure to give the signals was the cause of the injury, is a question for the jury.<sup>7</sup> Although, in ordinary cases, where there is no statute requiring the whistle of a railroad engine to be sounded at public crossing, or the ringing of the bell at such places, the question as to whether the omission to do so is negligence is a question of fact for the decision of a

<sup>1</sup> See Chap. 51, Negligence, subdn. 3. Such requirement of the statute merely superadds an additional duty on the company, the omission to discharge which, like the omission to discharge any common law duty would be, is negligence: *Steves v. The Oswego & S. R. R. Co.*, 18 N. Y. 422.

<sup>2</sup> *Elkins v. Boston & Albany R. R. Co.*, 115 Mass. 190.

<sup>3</sup> *Elkins v. Boston & Albany R. R. Co.*, 115 Mass. 190.

<sup>4</sup> *Terry v. Jewett*, 78 N. Y. 338.

<sup>5</sup> *McGrath v. N. Y. Cent. & H. R.*

*R. R. Co.*, 63 N. Y. 522; S. C. 59 N. Y. 468, 1 Thompson & C. 243, and 3 *Id.* 776; *Stoneman v. Atlantic & Pac. R. R. Co.*, 58 Mo. 508; *Holman v. Chi., R. I. & P. R. R. Co.*, 62 Mo. 562; *North Eastern Ry. Co. v. Wanless. L. R.* 7 H. L. 12; *Wanless v. N. E. Ry. Co.*, L. R. 6 Q. B. 481.

<sup>6</sup> *Briggs v. N. Y. Cent. & H. R. R. Co.*, 72 N. Y. 26.

<sup>7</sup> *Ills. Cent. R. R. Co. v. Benton*, 69 Ill. 174; *Dublin, W. & W. Ry. Co. v. Slattery, supra.*

jury,<sup>1</sup> yet it is negligence in law to omit the same when by statute the performance of such duties is required. The omission to perform an act required by statute, and of the description here involved, is negligence in itself;<sup>2</sup> but what the effect thereof may be, is another question. If injury ensue, and the statute renders the company liable therefor, by reason of not complying therewith, then the company are liable. If, however, no such liability exists by statute, then the omission must cause or contribute to the injury, to render the company liable, and the relative or contributive negligence of the plaintiff, as the case may be, must not be such as to prevent a recovery.<sup>3</sup>

Whilst by the statute in Illinois a penalty is imposed upon railroad companies for not putting up certain signs of warning at public crossings, and for omitting to ring a bell and blow the whistle of the engine at and in approaching such crossings, and renders railroad companies liable for all injuries inflicted and damages sustained at such places by any one by reason of such omission, yet it is not the purpose of the statute to render such companies liable for injuries not traceable to

<sup>1</sup> *Galena & Chi. Union R. R. Co. v. Dill*, 22 Ill. 271; *St. Louis, Jackson-ville & Chi. R. R. Co. v. Terhune*, 50 Ill. 151; *Cordell v. N. Y. Cent. & H. R. R. Co.*, 64 N. Y. 535; *S. C. 6 Hun*, 461; *Bauer v. Kansas Pac. Ry. Co.*, 69 Mo. 219; *Ellis v. Great Western Ry. Co., L. R.*, 9 C. P. 551. But see *Dyer v. Erie Ry. Co.*, 71 N. Y. 228.

<sup>2</sup> *Great Western R. R. Co. v. Geddis*, 33 Ill. 304; *St. Louis, Jackson-ville & Chi. R. R. Co. v. Terhune*, 50 Ill. 151; *ante*, p. 1006.

<sup>3</sup> But it is said in *Owens v. Hannibal & St. Joseph R. R. Co.*, 58 Mo. 386, 9 Am. Ry. Rep. 19, that such negligence is sufficient of itself to create a liability for cattle killed at the crossing, in the absence of contributory negligence by the owner; and relying upon *Howenstein v. Pacific R. R. Co.*, 55 Mo. 33. But in the same court, in

*Stoneman v. Atlantic & Pacific R. R. Co.*, 58 Mo. 503, 9 Am. Ry. Rep. 42, it is held that such negligence by itself will not authorize recovery, unless it appear that the killing was actually the result of the negligence; and citing *Karle v. Kansas City, St. Joseph & Council Bluffs R. R. Co.*, 55 Mo. 483, as authority for the position. And they say, in this case, that the *Howenstein* case, *supra*, does not announce any different doctrine, but relates to the proof necessary to show the connection between the negligence and the injury. The *Stoneman* case is conceived to be the better law, and is in accordance with the current of authority in those states where a different rule of negligence has not been established by statute, which does not appear to be the case in Missouri. See 1 *Wagner's Stat.*, p. 310, sec. 38.

such omission. The omission will not render them liable *per se*; the injury must be shown, by circumstances at least, to have been the consequence of, or caused by, such neglect.<sup>1</sup> And, moreover, it is the duty of persons approaching such places to be likewise in the observance of due care; and if they fail to look out and listen, so as to see or hear an approaching train, where, under the circumstances, and from the locality of the premises, trains are easily seen and heard, they themselves will be held accountable for negligence on their part, and may not be entitled to recover, unless for injuries wantonly inflicted.<sup>2</sup>

If, in consequence of a failure to give the signals required by law, horses are frightened, and injury is sustained therefrom by the owner, the company will be liable.<sup>3</sup>

Where there is no law requiring railroad companies to give signals and station flagmen at public crossings, they are not bound to do it, and therefore it is not negligence to omit to do so;<sup>4</sup> but if they choose of their own accord to do so, and for a length of time have flagmen at certain crossings to warn persons of danger, then the withdrawal of them without notice to the public may amount to a question of negligence to go to the

<sup>1</sup> Galena & Chi. Union R. R. Co. v. Loomis, 13 Ill. 548; Chicago & Rock Isld. R. R. Co. v. McKean, 40 Ill. 218, 229; Chicago, B. & Q. R. R. Co. v. Lee, 60 Ill. 501; Steves v. Oswego & Syracuse R. R. Co., 18 N. Y. 422; Briggs v. N. Y. Cent. & H. R. R. Co., 72 N. Y. 26.

<sup>2</sup> Chicago & Rock Isld. R. R. Co. v. McKean, 40 Ill. 218, 234; Chicago, Burlington & Quincy R. R. Co. v. Harwood, 80 Ill. 88; Lake Shore & Mich. Southern Ry. Co. v. Sunderland, 2 Bradw. (Ill.), 307; Steves v. Oswego & Syracuse R. R. Co., 18 N. Y. 422; Lang v. Holiday Creek R. & C. M. Co., 49 Ia. 469; Fletcher v. Atlantic & Pac. R. R. Co., 64 Mo. 484; Leduke v. St. Louis & Iron Mountain R. R. Co., 4 Mo. App. 485; Langan v. St. Louis, I. M. & S. Ry. Co., 5 Id. 311; Chi., R. I. & P. R. R. Co. v. Houston, 95 U. S. 697.

<sup>3</sup> Pollock v. Eastern R. R. Co., 124

Mass. 158, 17 Am. Ry. Rep. 402.

<sup>4</sup> Ernst, ex'x, v. The Hudson River R. R. Co., 39 N. Y. (12 Tiffany), 61; Beisiegel v. New York Cent. R. R. Co., 40 N. Y. (1 Hand), 9; Grippen, admr., v. The New York Cent. R. R. Co., 40 N. Y. (1 Hand), 34; Havens v. The Erie Ry. Co., 41 N. Y. (2 Hand), 296; McGrath v. N. Y. Cent. & H. R. R. Co., 63 N. Y. 522; S. C. 59 N. Y. 468; Pakalinsky v. Same, 82 N. Y. 424; Sutherland v. Same, 41 N. Y. Superior, 17; State v. Phila., Wilm. & Balt. R. R. Co., 47 Md. 76; Phila. & Reading R. R. Co. v. Killips, 88 Penn. St. 405; Stapley v. London, B. & S. C. Ry. Co., L. R. 1 Exch. 21; S. C. 4 Hurl. & C. 93; Stublely v. London & N. W. Ry. Co., L. R. 1 Exch. 13; Cliff v. Midland Ry. Co., L. R. 5 Q. B. 258; Bilbee v. London, B. & S. C. Ry. Co., 18 C. B. (N. S.), 584.



jury.<sup>1</sup> But even though the company discontinue the practice of flagging such crossings, and omit to give signals of warning thereat, yet that will not dispense with the necessity of ordinary care of travelers, who are none the less bound to both look and listen for trains.<sup>2</sup>

And so, in New York, the negligence of a flagman at a public crossing of a railroad, if it be the sole cause of an injury, will render the company liable;<sup>3</sup> for though it might not amount to negligence to omit to have a flagman stationed at a particular crossing, yet if one be placed there, and omit to do his duty, and by reason thereof an injury occurs, the company are liable, if the injured person be free of blame.<sup>4</sup> The question whether the company is bound to place a flagman at crossings is not one for the jury.<sup>5</sup>

A plaintiff will be exonerated from the imputation of negligence, when suing for a personal injury, if it appear that the

<sup>1</sup> Ernst, ex'x, v. The Hudson River R. R. Co., 39 N. Y. (12 Tiffany), 61; Beisiegel v. New York Cent. R. R. Co., 40 N. Y. (1 Hand), 9; Grippen v. The New York Cent. R. R. Co., 40 N. Y. (1 Hand), 34; Havens v. The Erie Ry. Co., 41 N. Y. 296; Lake Shore & Mich. Southern Ry. Co. v. Sunderland, 2 Bradw. (Ill.), 307. But if the injured party knows of such discontinuance of the practice of flagging the crossing, then the discontinuance raises no question of negligence: Ernst v. Hudson River R. R. Co., and Beisiegel v. N. Y. Cent. R. R. Co., *supra*. The injury must be the result of defendant's negligence alone, unmixed with any other cause, else defendant is not liable: Grippen v. N. Y. Cent. R. R. Co., *supra*. In the case of Havens v. Erie Ry. Co., *supra*, the court say, GROVER, J.: "It may now be regarded as settled by this court, that a traveler approaching a crossing is required to use his eyes and ears in looking and listening to ascertain whether trains are approaching, irrespective of the question whether the

signals required by statute are given upon the train, and that if an injury is received in consequence of his omission so to do, he can not recover therefor": 41 N. Y. 298, 299.

<sup>2</sup> Havens v. Erie Ry. Co., *supra*; L. S. & M. S. Ry. Co. v. Sunderland, *supra*.

<sup>3</sup> Kissenger v. The New York & Harlem R. R. Co., 56 N. Y. (11 Sickels), 538; Dolan v. Del. & Hudson Canal Co., 71 N. Y. 285; Casey v. N. Y. Cent. & H. R. R. Co., 78 N. Y. 518; S. C. 8 Daly, 220, and 6 Abb. N. C. 104; Borst v. Lake Shore & Mich. Southern Ry. Co., 4 Hun, 346; St. Louis, Vandalia & Terre Haute R. R. Co. v. Dunn, 78 Ill. 197; Phila. & Reading R. R. Co. v. Killips, 88 Penn. St. 405.

<sup>4</sup> Kissenger v. The New York & Harlem R. R. Co., 56 N. Y. (11 Sickels), 538.

<sup>5</sup> Dyer v. Erie Ry. Co., 71 N. Y. 228; State v. Phila., Wilm. & Balt. R. R. Co., 47 Md. 76; Cliff v. Midland Ry. Co., *supra*. But see Eaton v. Fitchburg R. R. Co., 129 Mass. 364.

injury was received on a crossing of the railroad, where there was no flagman, and during the confusion occasioned by the passage of two trains at the same time, running in different directions with great speed, so that in endeavoring to avoid the one, the party was injured by the other—there being no warning given, either by the whistle or bell, and it being in evidence that plaintiff is somewhat deficient in the sense of hearing.<sup>1</sup> For it is not only negligence to omit warnings on such an occasion at such a place, but such, too, may be the omission to flag the crossing; for although the law does not require a railroad company to keep flagmen at ordinary crossings of public highways in the country, yet if circumstances exist rendering it wanting in ordinary care not to do so, then if omitted, and injury and damage be caused by reason of such omission, the company corporation is liable, if there be no contributory negligence on the part of those suffering the injury.<sup>2</sup>

It is held in Iowa, generally, that whenever the safety of persons or property demands that signals be given at crossings, failure to give them will be negligence, even in the absence of a statute requiring them.<sup>3</sup>

**3. Omission to ring bell or sound whistle may be negligence, though not required by statute.**—If there be no statute, as is the case in some of the states,<sup>4</sup> requiring bell ringing and sounding of the whistle at such public crossings, yet it does not follow therefrom that these signals need not be given. This will depend upon circumstances. Railroad companies are bound to observe at least ordinary care in approaching and passing such places; and if there be obstructions in the way of seeing approaching trains, or there be high winds, or other circumstances likely to prevent persons from hearing the ordinary noise of approaching trains, these circumstances may render such signals necessary to due care on the part of the company. Of the existence of these facts and circumstances, the jury are to judge,

<sup>1</sup> New Jersey R. R. & T. Co. v. West, 3 Vroom (N. J.), 91.

<sup>2</sup> Pennsylvania R. R. Co. v. Matthews, 36 N. J. Law (7 Vroom), 531; Phila. & Reading R. R. Co. v. Killips, 88 Penn. St. 405; Cliff v. Midland Ry. Co., *supra*.

<sup>3</sup> Gates v. Burlington, Cedar Rapids & Missouri River Ry. Co., 39 Ia. 45, 9 Am. Ry. Rep. 75.

<sup>4</sup> Spencer v. Ill. Cent. R. R. Co., 29 Iowa, 55; Artz v. The Chi., R. Isld. & P. R. R. Co., 34 Iowa, 153.

if the case be tried by jury, and also as to the comparative or contributory negligence of the injured party.<sup>1</sup>

But the current of authorities hold, that if there be an unobstructed view of the road, so that one may be able to see an approaching train to avoid injury from it, there can be no recovery for an injury received under such circumstances by one knowing of his approach to such crossing, although there may be negligence on the part of the company, or even omission to comply with a statutory requirement.<sup>2</sup> In the absence of statu-

<sup>1</sup> *Artz v. The Chi., R. Isld. & P. R. R. Co.*, 34 Iowa, 153; *Edson v. Central R. R. Co.*, 40 Ia. 47, 8 Am. Ry. Rep. 412; *Milwaukee & Chi. R. R. Co. v. Hunter*, 11 Wis. 160; *Kennayde v. Pac. R. R. Co.*, 45 Mo. 255; *Tabor v. Mo. Valley R. R. Co.*, 46 Mo. 353; S. C. 2 Am. R. 517; *Beisiegel v. N. Y. Cent. R. R. Co.*, 34 N. Y. 622; *Renwick v. N. Y. Cent. R. R. Co.*, 36 N. Y. 132; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468; *Telfer v. Northern R. R. Co.*, 30 N. J. 188; *Evansville & Crawfordsville R. R. Co. v. Lowdermilk*, 15 Ind. 120; *Indianapolis, P. & C. R. R. Co. v. Keely*, 23 Ind. 133; *Galena & Chi. Union R. R. Co. v. Dill*, 22 Ill. 264.

<sup>2</sup> *Artz v. The Chi., R. Isld. & P. R. R. Co.*, 34 Iowa, 153; *Steves v. The Oswego & Syracuse R. R. Co.*, 18 N. Y. 422; *Wilds v. The Hudson River R. R. Co.*, 29 N. Y. 315; *Gonzales v. N. Y. & Harlem R. R. Co.*, 38 N. Y. 440; *Ernst v. The Hudson River R. R. Co.*, 39 N. Y. 61; *Wilcox v. Rome, W. & O. R. R. Co.*, 39 N. Y. 358; *Grippen v. N. Y. Cent. R. R. Co.*, 40 N. Y. 34; *Havens v. The Erie Ry. Co.*, 41 N. Y. 296; *Baxter v. Troy & Boston R. R. Co.*, 41 N. Y. 502; *Nicholson v. The Erie Ry. Co.*, 41 N. Y. 525; *Sheffield v. Rochester & S. R. R. Co.*, 21 Barbour, 339; *Casey v. N. Y. Cent. & H. R. R. Co.*, 6 Abb. N.

C. 104; S. C. 78 N. Y. 518; *McGrath v. Same*, 59 N. Y. 468; S. C. 63 N. Y. 522, 1 *Thomp. & C.* 243, and 3 *Id.* 776; *Morris & Essex R. R. Co. v. Haslan*, 4 Vroom (N. J.), 147; *Runyon v. Cent. R. R. Co.*, 1 Dutch (N. J.), 558; *Chi. & Rock Isld. R. R. Co. v. Still*, 19 Ill. 499; *Ill. Cent. R. R. Co. v. Buckner*, 28 Ill. 303; *Chi. & Alton R. R. Co. v. Gretzner*, 46 Ill. 74; *Chi. & Alton R. R. Co. v. Fears*, 53 Ill. 115; *Evansville & C. R. R. Co. v. Hiatt*, 17 Ind. 102; *Toledo & Wabash Ry. Co. v. Goddard*, 25 Ind. 185; *Pittsburgh, Fort Wayne & Chi. Ry. Co. v. Vining*, 27 Ind. 513; *Lafayette & Indianapolis R. R. Co. v. Huffman*, 28 Ind. 287; *North Penn. R. R. Co. v. Heileman*, 49 Penn. St. 60; *Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Elliott*, 28 Ohio St. 340, 14 Am. Ry. Rep. 123; *Cleveland, C. & C. R. R. Co. v. Terry*, 8 Ohio St. 570; *Brown v. Milwaukee & St. Paul Ry. Co.*, 22 Minn. 165, 19 Am. Ry. Rep. 298; *Cogswell v. Oregon & Cal. R. R. Co.*, 6 Oreg. 417. See *Dublin, W. & W. Ry. Co. v. Slattery*, L. R. 3 App. Cas. 1155; S. C. Irish Rep. 8 C. L. 531, and 10 *Id.* 256. The case of *Brown v. M. & St. P. Ry. Co.*, *supra*, holds that a whistle need not be blown on approaching a crossing. But see *contra*, *Phila., Wilm. & Balt. R. R. Co. v. Stinger*, 78 Penn. St. 219.

tory regulations, it is for the jury to say what signals are essential.<sup>1</sup>

4. **Other, and ordinary, care must also be observed.**—The company are not absolved from the use of proper care in other respects at public crossings, by complying with such positive requirements as bell ringing, sounding the whistle, and putting up signs of warning. If other precautions are reasonably necessary, the company is bound to take them; and the fact as to negligence may be rightly left to the jury, under all the circumstances, they having due regard to the relative positions of the roads at and near to the crossing, the time of day or night, and the weight and velocity of the engine or train.<sup>2</sup> The duties imposed by statute in such cases, in regard to bell ringing and whistling, and putting up signs, are in their nature cumulative, and are not intended as a substitute for such other means of observing ordinary care as a reasonable regard for the safety of others may require.

Some nice questions have arisen in relation to the legal consequences of giving and of omitting to give signals of warning at railroad crossings of highways, as also, in regard to the same, when a locomotive standing at or near a highway crossing, and approaching such crossing, is about starting to cross. Circumstances may be such as to render it negligent and imprudent to give such signal when thereby horses in waiting or approaching vehicles, designing to cross, are likely to be frightened, and injuries ensue therefrom.<sup>3</sup> On the other hand, the omission to signalize the movements, or intended movements, of the train or locomotive, may in itself involve a degree of negligence

<sup>1</sup> *Cordell v. N. Y. Cent. & H. R. R. Co.*, 64 N. Y. 535; *S. C.* 6 Hun, 461; *Paducah & Memphis R. R. Co. v. Hoehl*, 12 Bush, 41; *Bauer v. Kans. Pac. Ry. Co.*, 69 Mo. 219; *Ellis v. Great Western Ry. Co.*, Law Rep. 9 C. P. 551. But see *Dyer v. Erie Ry. Co.*, 71 N. Y. 228.

<sup>2</sup> *Bradley v. The Boston & Maine R. R. Co.*, 2 Cush. 539; *Linfield v. Old Colony R. R. Co.*, 10 Cush. 562; *S. C.* 1 Am. R. W. Cas. 457; *Parker v. Adams*, 12 Met. 415; *Webb v. Portland & Kennebec R. R. Co.*, 57 Me.

117; *Eaton v. Erie Ry. Co.*, 51 N. Y. 544. 4 Am. Ry. Rep. 524; *Weber v. N. Y. Cent. & H. R. R. Co.*, 67 N. Y. 587; *S. C.* 58 N. Y. 451; *Cordell v. Same*, 70 N. Y. 119; *S. C.* 64 N. Y. 535, 79 N. Y. 636, and 6 Hun, 461; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Hart v. Chi., R. I. & P. Ry. Co.*, 56 Ia. 166; *S. C.* 7 N. W. Repr. 9; *South & N. Ala. R. R. Co. v. Thompson*, 62 Ala. 494.

<sup>3</sup> *Hill v. The Portland & Rochester R. R. Co.*, 55 Maine, 438.

dangerous to persons in waiting to cross, and yet not necessarily so *per se*. So that it is not always easy for those in charge thereof to determine, in the exercise of an honest discretion, whether, under the particular circumstances of the case in hand, it be safer for those approaching, or in waiting to cross, to give or to omit to give the customary signals. The action of the company in such cases "must be subjected to the test of reasonableness, in view of the rights and duties of" those "who may be affected by them," and the circumstances are for the consideration of the jury.<sup>1</sup> The giving of a signal, however, at a time and place, and in the manner, required by law, will not be imputed to the company for negligence; but on the contrary, the omission to do so would, and the company will be liable for injuries resulting from such omission, if without the fault or negligence of the injured party.<sup>2</sup> In the case cited from 55 Maine, *Hill v. The Portland & Rochester R. R. Co.*, the court say, KENT, Justice: "Of course, no railroad company can be held liable for damages for giving such notice as is required by law, when given at the distance named in the statute. The company may be liable for the damages occasioned by a neglect of this duty. But the statute does not authorize or require the sounding of the whistle at any other time or place. The right or liability, at other times and places, depends upon the general principles of law, as before explained, applicable to the particular facts in each case. In every case, then, it becomes a question, whether, in that particular case, the act was reasonable and within the rule of ordinary care, under all the circumstances of time and place and all the surroundings."<sup>3</sup>

<sup>1</sup> *Hill v. The Portland & Rochester R. R. Co.*, 55 Maine, 438.  
*R. R. Co.*, 55 Maine, 438.

<sup>2</sup> 55 Maine, 441, 442.

<sup>3</sup> *Hill v. The Portland & Rochester*

## CHAPTER LI.

### NEGLIGENCE.

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**1. Definition thereof.**—We have been unable to frame in our own mind, or by researches to find in the books, any one perfect or satisfactory definition of the term negligence, alike applicable, without more and without less, to all cases. The question of negligence is in its very nature so dependent upon the time, place and circumstances surrounding each particular transaction, and so much influenced by the legal obligations and relative duties, of both commission and omission, that it comes before the jurist in aspects as varied as the ever changing landscapes of the country, or the diversity of human affairs. No one is the type of all the rest, even if two or more of them be alike. One learned jurist has justly said that “There is no absolute rule of negligence or diligence.”<sup>1</sup> Nor is actual knowledge of danger necessary to render one guilty of negligence by seeming disregard thereof; it is sufficient if reasonable cause to apprehend it exist.<sup>2</sup>

We are not unmindful that in the case cited the learned judge lays down the rule of diligence to be, “that care and attention to

<sup>1</sup> Per MILLER, Justice, in *Finlayson v. The Chi., B. & Q. R. R. Co.*, 1 Dillon's C. C. R., 579, 581; *Philadelphia & Reading R. R. Co. v. Spearen*, 47 Penn. St. (11 Wright), 300. In the case last cited, the Supreme Court of Pennsylvania say: “There is no absolute rule as to negligence to cover all

cases. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third.” 47 Penn. St. 305.

<sup>2</sup> *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St. (13 Wright), 186, 192.

the matter in hand which an ordinarily prudent, careful man would exercise in regard to his own transactions." This, however, is not given as an universal rule, but as the rule of diligence for the jury in the particular case then under consideration.<sup>1</sup>

Another learned judge defines negligence to be the "omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation."<sup>2</sup>

Many judges and writers have laid down degrees of negligence, as slight, ordinary, and gross; but the more modern tendency is to disregard these distinctions.<sup>3</sup> "Strictly speaking (say the Supreme Court of the United States<sup>4</sup>), these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far; since the requirement of different degrees of care in differ-

<sup>1</sup> 1 Dillon's C. C. R., 581. And see *Norfolk & Petersburg R. R. Co. v. Ormsby*, 27 Gratt. 455, 17 Am. Ry. Rep. 321.

<sup>2</sup> Per DILLON, Justice, in *Stout v. Sioux City & Pacific R. R. Co.*, 2 Dil-

lon's C. C. R., 294, 297. And see *Balt. & Pot. R. R. Co. v. Jones*, 95 U. S. 439, per SWAYNE, J., p. 441.

<sup>3</sup> *New York Cent. R. R. Co. v. Lockwood*, 17 W-" ~~~

<sup>4</sup> *Ibid.*

ent situations is too firmly settled and fixed in the law to be ignored or changed.”<sup>1</sup>

Here, then, in the case quoted from, we have a distinct disavowal of degrees of negligence, and negligence in that particular case is defined to be, “failure to bestow the care and skill which the situation demands.”

It is negligence, where fire is communicated from a mere construction train, for those in charge thereof to proceed on, and not leave a part of the force of hands to extinguish the fire; and such fact being established will, in the absence of other circumstances, render the company liable for damages sustained from such fire.<sup>2</sup> But *semble*, that in case the train be a passenger or freight train, the ruling is to the contrary, as the safety of the train is then not only the first matter of consideration, but also for the reason that no force could be spared from such train to extinguish the fire.

It is not in itself an act of negligence to place a passenger train upon a side track of a station, to enable a freight train to pass upon the main line, when a necessity for it exists—as, for instance, when the freight train is too long for the side track or switch; and such an occurrence not being ordinary, but out of the usual course, as a means of meeting an unforeseen emergency.<sup>4</sup>

It is negligence for a passenger to attempt to leave the train, under ordinary circumstances, while the same is in motion; and more especially so when warned by the conductor of the danger thereof.<sup>5</sup>

Though it is negligence for a railroad company to leave its train of cars standing and blocking up a public crossing of the streets for a longer time than the law allows, or under circumstances not authorized by law at all, so as to endanger the safety of persons attempting to cross,<sup>6</sup> yet to endeavor to cross by

<sup>1</sup> New York Central R. R. Co. v. Lockwood, 17 Wall. 357, 382, 383.

<sup>2</sup> Rolke v. The Chicago & N. Western Ry. Co., 26 Wis. 537.

<sup>3</sup> Rolke v. The Chicago & N. Western Ry. Co., 26 Wis. 537.

<sup>4</sup> Ohio & Miss. R. R. Co. v. Schiebe, 44 Ill. 460.

<sup>5</sup> Ohio & Miss. R. R. Co. v. Schiebe, 44 Ill. 460; Lake Shore & Mich. South-

ern Ry. Co. v. Roy, 5 Bradw. (Ill.), 82; Galveston, H. & S. A. R. R. Co. v. LeGierse, 51 Tex. 189; Nelson v. Atlantic & Pac. R. R. Co., 68 Mo. 593; Harvey v. Eastern R. R. Co., 116 Mass. 269; Richmond & Danville R. R. Co. v. Morris, 31 Gratt. 200.

<sup>6</sup> Rauch v. Lloyd & Hill, 31 Penn. St. (7 Casey), 358.



crawling underneath the cars, where they are so standing in the crossing, is also such negligence and want of care as would, if an injury be incurred thereby by an adult person, amount to contributory negligence on his part, and prevent a recovery of damages by him for the injury.<sup>1</sup> But where, under like circumstances, the injury be to a minor of tender years, such want of care and prudence on his part is not imputable to him as contributory negligence, in an action by him for damages caused by the injury.<sup>2</sup>

The person injured in the case here cited from 31 Penn. State Reps., 358, was a lad of the age of six or seven years. The court say: "Considering his age, and all the circumstances of the case, we see nothing that would justify the imputation of negligence or imprudence. He acted like a child, and he is not to be judged as a man."

It is not sufficient to make out a case of contributory negligence against a plaintiff injured while a passenger upon a train, that he acted in disobedience of the reasonable orders of the conductor, or was where he ought not to be thereon; but it must also appear that such conduct or act on his part contributed in some degree to bring upon himself the injury complained of.<sup>3</sup>

Detaching the locomotive, and allowing cars to move into a depot alone, where they strike against a bumper, and thus injure a passenger, is also negligence on the part of the railroad company.<sup>4</sup>

**2. Contributory negligence.**—Except in the courts of Georgia and Illinois, and possibly Kansas, the doctrine of what is called contributory negligence, is holden in the courts of all the American states; also in the Federal courts, and in England. The principle upon which it rests is, that if the plaintiff suing for an injury has in any manner, by his own wrong, negligence,

<sup>1</sup> *Rauch v. Lloyd & Hill*, 31 Penn. St. (7 Casey), 358, 370.

<sup>2</sup> *Rauch v. Lloyd & Hill*, 31 Penn. St. (7 Casey), 358, 370, 371; *Pennsylvania R. R. Co. v. Kelly*, 31 Penn. St. (7 Casey), 372. In the case last cited, the person injured was a boy nine years of age, who was injured in attempting to pass over a public crossing by creeping under a standing train of cars; and

the court say, as to the imputation of negligence: "We can not say it was, as a legal conclusion, and the jury did not find it as a conclusion of fact."

<sup>3</sup> *Lawrenceburgh & Upper Miss. R. R. Co. v. Montgomery*, 7 Ind. (Porter), 474.

<sup>4</sup> *Wylde v. Northern R. R. Co.*, 53 N. Y. 156, 5 Am. Ry. Rep. 375.

or want of ordinary and reasonable care, directly, that is proximately, contributed to the injury complained of, he can not recover. As has been said by that eminent jurist, Lord ELLENBOROUGH, "One person being in fault will not dispense with another's using ordinary care for himself." In *Brown v. Hannibal*

<sup>1</sup> *Butterfield v. Forrester*, 11 East, 60; *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566; *Rusch v. Davenport*, 6 Iowa, 451, 452, 453; *Parks v. Davis*, 16 Iowa, 20; *Donaldson & others, admrs., v. The Miss. & Mo. R. R. Co.*, 18 Iowa, 280; *McAunich v. The Miss. & Mo. R. R. Co.*, 20 Iowa, 338; *Hoben v. The B. & M. R. R. Co.*, 20 Iowa, 562, 566; *Haley v. Chi. & N. W. Ry. Co.*, 21 Iowa, 15; *Sherman v. The Western Stage Co.*, 24 Iowa, 515; *Greenleaf v. The Ill. Cent. R. R. Co.*, 29 Iowa, 14, 46; *Spencer v. The Ill. Cent. R. R. Co.*, 29 Iowa, 55; *Kesee v. Chi. & N. W. R. R. Co.*, 30 Iowa, 78; *Reynolds v. Hindman*, 32 Iowa, 146, 149; *Muldowney v. The Ill. Cent. R. R. Co.*, 32 Iowa, 176; *O'Keefe v. The Chicago, Rock Island & Pacific R. R. Co.*, 32 Iowa, 467, 469; *Hamilton v. Des Moines Valley R. R. Co.*, 36 Iowa, 31; *Carlin v. Chi. Rock Isl. & Pacific R. R. Co.*, 37 Iowa, 316; *Willoughby v. Chi. & N. W. R. R. Co.*, 37 Ia. 432; *Payne v. Chicago, Rock Island & Pacific Ry. Co.*, 39 Ia. 523, 9 Am. Ry. Rep. 176; *The State v. Grand Trunk Ry. Co.*, 58 Maine, 176; *S. C. 4 Am. R.* 258, 262; *Laing v. Colder*, 8 Penn. St. R. 479; *S. C. 2 Am. R. W. Cas.* 378; *Reeves v. The Delaware, Lackawanna & Western R. R. Co.*, 30 Penn. St. (6 Casey), 454; *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. (13 Wright), 101; *Catawissa R. R. Co. v. Armstrong*, 49 Penn. St. (13 Wright), 186, 192; *Pittsburg, Fort Wayne & Chicago R. R. Co. v. Karns*, 13 Ind. 87; *Indianapolis & Cin. R. R. Co. v. Wright*, 13 Ind. 213; *Evansville & C. R. R. Co.*

*v. Lowdermilk*, 15 Ind. 120; *Ohio & Miss. R. R. Co. v. Gullett*, 15 Ind. 487; *Evansville & Crawfordsville R. R. Co. v. Hiatt*, 17 Ind. 102, 105; *Indianapolis & Cin. R. R. Co. v. Wright*, 22 Ind. 376; *Indianapolis, Pittsburg & Cleveland R. R. Co. v. Keely's Admrs.*, 23 Ind. 133; *Toledo & Wabash Ry. Co. v. Goddard*, 25 Ind. 185; *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228; *Indianapolis & Cin. R. R. Co. v. Rutherford*, 29 Ind. 82; *Jeffersonville, M. & I. R. R. Co. v. Bowen*, 40 Ind. 545; *Jeffersonville, Madison & Indianapolis R. R. Co. v. Adams*, 43 Ind. 402; *Hathaway v. Toledo, Wabash & Western Ry. Co.*, 46 Ind. 25; *Robinson v. Fitchburg & Worcester R. R. Co.*, 7 Gray, 92; *Bancroft v. Boston & Worcester R. R. Co.*, 97 Mass. 275; *Burns v. Boston & Lowell R. R. Co.*, 101 Mass. 50; *Forsyth v. Boston & Albany R. R. Co.*, 103 Mass. 510; *Ill. Cent. R. R. Co. v. Buckner*, 28 Ill. 299; *Ward & Butterfield v. Mil. & St. Paul R. W. Co.*, 29 Wis. 144, 145; *Klein, for use, etc., v. Crescent City R. R. Co.*, 23 La. An. 729; *Rathbun & West v. Payne and others*, 19 Wend. 399; *Wilds v. The Hudson River R. R. Co.*, 24 N. Y. (10 Smith), 430; *Deyo v. New York Cent. R. R. Co.*, 34 N. Y. (7 Tiffany), 9; *Van Schaick v. The Hudson River R. R. Co.*, 43 N. Y. (4 Hand), 527; *Warner v. The New York Cent. R. R. Co.*, 44 N. Y. 465; *Moore v. Cent. R. R. Co.*, 4 Zab. 268; *Cent. R. R. Co. of N. Jersey v. Moore*, 4 Zab. 824; *Runyon v. The Central R. R. Co. of N. Jersey*, 1 Dutch. 556; *The Morris & Essex R. R. Co. v. Haslan and others*, 4 Vroom (N. J.), 147;

& St. Joe R. R. Co., 50 Mo. 461, the Supreme Court of Missouri rule differently from the principles of our text, and seem to thus apply the principle here quoted from Lord ELLENBOROUGH in such manner to defendant, instead of the injured party, as to entirely exempt the injured party from the necessity of care on his part, or from the effect of negligence on his part, if it turns out in evidence that the observance of care on the part of defendant would have avoided the injury, notwithstanding the negligence of the injured party. This we deem a departure from well settled general principles, although there are some decisions in accord with it.

Lake Shore & Mich. S. R. R. Co. v. Miller, 25 Mich. 274; Kelly v. Hendrie, 26 Mich. (4 Post), 255; Conlin v. Charleston, 15 Rich. (So. Car.) Law, 201; Balt. & Ohio R. R. Co. v. Lamborn, 12 Md. 257; Keech v. Balt. & Washn. R. R. Co., 17 Md. 32; The State, use of Coughlan, v. Balt. & Ohio R. R. Co., 24 Md. 102; Bannon v. Balt. & O. R. R. Co., 24 Md. 119; Balt. & O. R. R. Co. v. State, use of Miller, 29 Md. 252; Northern Cent. Ry. Co. v. State, use, etc., 29 Md. 420; Balt. & O. R. R. Co. v. Fitzpatrick, 35 Md. 32; Lewis v. Balt. & O. R. R. Co., 38 Md. 588; Pittsburg & Connellsville R. R. Co. v. Andrews, 39 Md. 329; State, use, etc., v. Phil., Wilm. & Balt. R. R. Co., 47 Md. 76, 18 Am. Ry. Rep. 253; Timmons v. The Central Ohio R. R. Co., 6 Ohio St. 105; Pittsburg, Fort Wayne & Chicago Ry. Co. v. Krichbaum's Admr., 24 Ohio St. 119, 7 Am. Ry. Rep. 200; Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Elliott, 28 Ohio St. 340, 14 Am. Ry. Rep. 123; Manly v. Wilmington & Weldon R. R. Co., 74 N. Car. 655, 13 Am. Ry. Rep. 105; Baltimore & Potomac R. R. Co. v. Jones, 95 U. S. (5 Otto), 439; S. C. 14 Am. Ry. Rep. 353; Meyer v. The Peoples' R. W. Co., 43 Mo. 523; Harlan v. St. Louis, Kansas City & North-

ern R. R. Co., 64 Mo. 480, 17 Am. Ry. Rep. 300; Paducah & Memphis R. R. Co. v. Hoehl, 12 Bush, 41, 18 Am. Ry. Rep. 338; Carroll v. The Minnesota Valley R. R. Co., 13 Minn. 30; Donaldson v. Milwaukee & St. Paul Ry. Co., 21 Minn. 293, 20 Am. Ry. Rep. 15; Brown v. Milwaukee & St. Paul Ry. Co., 22 Minn. 165, 19 Am. Ry. Rep. 298; George v. St. Louis, Iron Mountain & Southern Ry. Co., 34 Ark. 613; S. C. 1 Am. & Eng. R. R. Cas. 294. Such contributive negligence, however, will not justify the company in a total disregard of care, and an apparent recklessness in running its trains in populous places: Lafayette & Indianapolis R. R. Co. v. Adams, 26 Ind. 76; Indianapolis & Cin. R. R. Co. v. McClure, 26 Ind. 370; Penn. Co. v. Sinclair, 62 Ind. 301; Meyers v. Chicago, Rock Island & Pacific R. R. Co., 59 Mo. 223, 8 Am. Ry. Rep. 473; Rounds v. Del., Lack. & W. R. R. Co., 64 N. Y. 129; S. C. 3 Hun, 329, and 5 Thomp. & C. 475; McCarty v. Del. & Hudson C. Co., 17 Hun, 74; and the question of their negligence in this regard is for the jury: Weber v. New York Central & Hudson River R. R. Co., 58 N. Y. 45, 7 Am. Ry. Rep. 188; Meyers v. C., R. I. & P. R. R. Co., *supra*. And so if the negligence, in case of injury to a child,

The correct rule we conceive to be, not that the plaintiff, in order to recover, must in all cases use the utmost degree of care to avoid the injury,<sup>1</sup> but that he must show affirmatively (unless from the evidence it otherwise appear) that he himself used ordinary care; which, in the language of Lord Chief Justice DENMAN, in *Lynch v. Nurdin*,<sup>2</sup> means "that degree of care which may reasonably be expected from a person in the plaintiff's situation"; this "is synonymous," says the learned judge, in *Beers v. The Housatonic R. R. Co.*, *supra*, "with *reasonable care*." The negligence of the plaintiff, to preclude him from a recovery, must be "such as that he could, by ordinary care, have avoided the consequences of the defendants' negligence."<sup>3</sup> "A party is not

be the negligence of the parents: *Pittsburg, Fort Wayne & Chi. Ry. Co. v. Vining's Adm.*, 27 Ind. 513. But that the negligence of a third party contributed to bring about the injury, is no defense: *Webster v. The Hudson River R. R. Co.*, 38 N. Y. (11 Tiffany), 260; *Sheridan v. The Brooklyn City & Newtown R. R. Co.*, 36 N. Y. 39; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230; *Paulmier v. The Erie R. R. Co.*, 5 Vroom, 151. If the action is for causing death, then, in Maryland, the plaintiff must not only show that the deceased did not, by his negligence, contribute to the injury, but also, that those persons did not who are entitled to the benefit of the recovery: *State v. B. & O. R. R. Co.*, *supra*; *Baltimore & O. R. R. Co. v. State*, 30 Md. 47. But in Ohio it is ruled otherwise, in *Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172. And an instruction permitting a contrary inference will be cause for reversal: *Baltimore & Ohio R. R. Co. v. Whittaker*, 24 Ohio St. 642, 7 Am. Ry. Rep. 182; *Marietta & Cincinnati R. R. Co. v. Picksley*, 7 Am. Ry. Rep. 186; *S. C. 24 Ohio St. 654*.

<sup>1</sup> *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566; *S. C. 2 Am. R. W. Cas.*

114; *Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25; *S. C. 1 Am. & Eng. R. R. Cas. 115*; *State v. Manchester & L. R. R. Co.*, 52 N. H. 528; *Creed v. Penn. R. R. Co.*, 86 Penn. St. 139; *Thirteenth & Fifteenth Sts. Pass. Ry. Co. v. Boudrou*, 92 Penn. St. 475; *S. C. 10 Repr. 156*.

<sup>2</sup> 1 Adol. & El. (N. S.), 36; *Finlayson, Admx., v. The C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R., 579. And see *Nashville & Chattanooga R. R. Co.*, and *M. & C. R. R. Co., v. Carroll*, 6 Heisk. 347, 12 Am. Ry. Rep. 20.

<sup>3</sup> *Bridge v. Grand Junction Ry. Co.*, 3 M. & W. 244, 247; *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566; *S. C. 2 Am. R. W. Cas. 114, 122*; *Finlayson, Admx., v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R., 579; *Penn. R. R. Co. v. Werner*, 89 Penn. St. 59; *Manly v. Wilmington & Weldon R. R. Co.*, 74 N. Car. 660. An instruction that the plaintiff can not recover unless the proof shows that by the exercise of proper care he could not have averted the injury, is erroneous, as submitting a question of law to the jury as to what is proper care. Ordinary care is all the law requires: *Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25; *S. C. 1 Am. & Eng. R. R. Cas. 115*.

to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right. \* \* \* One person being in fault will not dispense with another's using ordinary care for himself." Such is the language of the court in *Butterfield v. Forrester*, re-asserted and adopted by the Supreme Court of Connecticut, in the leading case of *Beers v. The Housatonic R. R. Co.*<sup>1</sup>

What is reasonable care, in any case, depends upon the particular circumstances of that case. Precautions which would be reasonable in one case, may not be deemed so in another case. It is impossible for the law to define the acts which, in all cases, would or would not amount to reasonable care.<sup>2</sup>

Therefore, in those states where the doctrine of contributory negligence prevails, it is the duty of the plaintiff to prove, and the right of the defendant charged with negligence causing an injury, that he should prove, by satisfactory evidence, that he did not contribute to the injury by any wrong act or negligence amounting to want of ordinary care on his part. This proof, in some form, constitutes a part of plaintiff's case: and if the evidence or circumstances of the case do not otherwise establish the fact, then the burden of proof is upon the plaintiff to show that he was not only free from fault contributing to the injury, but also, was observing on his part ordinary and reasonable care to avoid it.<sup>3</sup> And the same is true in actions by em-

<sup>1</sup> 19 Conn. 566; *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R., 579; *Gerety v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 81 Penn. St. 274, 16 Am. Ry. Rep. 164; *Artman v. Kans. Cent. Ry. Co.*, 22 Kans. 296.

<sup>2</sup> *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566; S. C. 2 Am. R. W. Cas. 114, 123. In determining whether a locomotive engineer, injured by a collision, is guilty of negligence in not jumping off the engine, the standard of ordinary care and prudence on his part must be fixed with reference to the peculiar responsibilities of his employment: *Cottrill v. Chicago, Milwaukee & St. Paul Ry. Co.*, 47 Wis.

634, 21 Am. Ry. Rep. 66.

<sup>3</sup> *Harlow v. Humiston*, 6 Cow. 189; *Warner v. The New York Cent. R. R. Co.*, 44 N. Y. 465; *Rusch v. Davenport*, 6 Iowa, 443, 451; *Donaldson v. Miss. & Mo. R. R. Co.*, 18 Iowa, 280; *Sherman v. Western Stage Co.*, 24 Iowa, 515, 562; *Greenleaf v. The Ill. Cent. R. R. Co.*, 29 Iowa, 14, 46; *Baird v. Morford*, 29 Iowa, 531, 536; *Kesee v. The Chi. & N. W. R. R. Co.*, 30 Iowa, 78; *Reynolds v. Hindman*, 32 Iowa, 146, 149; *Muldowney v. The Ill. Cent. R. R. Co.*, 32 Iowa, 176; *O'Keefe, Admx., v. Chi., R. Island & P. R. R. Co.*, 32 Iowa, 467; *Greenleaf v. Dubuque & Sioux City R. R. Co.*,

ployes against the company.<sup>1</sup> This proof, however, may be made otherwise than by direct evidence; it may be by circumstances, or in any other manner that facts are ordinarily allowed to be proven.<sup>2</sup>

The Supreme Court of the United States hold that the burden of proof to show contributory negligence of the injured person is on the defendant, if nothing is shown in that respect by the evidence of the plaintiff; and that the plaintiff is not bound to prove affirmatively that the injured person was in the observance of due care and caution upon his part.<sup>3</sup> This case originated in the District of Columbia. The injured person was an infant or child

33 Iowa, 52; *Benton v. Cent. R. R. Co.*, 42 Ia. 192; *Belair v. Chicago & N. W. R. R. Co.*, 43 Ia. 662, 14 Am. Ry. Rep. 575; *Lang v. Holiday Creek R. & C. M. Co.*, 49 Ia. 469; *Beers v. The Housatonic R. R. Co.*, 19 Conn. 566; S. C. 2 Am. R. W. Cas. 114; *Foster v. Dixfield*, 6 Shep. 380; *French v. Brunswick*, 8 Shep. 29; *The State v. Grand Trunk Ry. Co.*, 58 Maine, 176; S. C. 4 Am. R. 258, 262; *Tourtellot v. Rosebrook*, 11 Met. 460; *Smith v. Smith*, 2 Pick. 623; *Lane v. Crombie*, 12 Pick. 177; *Adams v. Inhabitants of Carlisle*, 21 Pick. 146; *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257; *Sedgwick on Damages*, 468; *St. Louis & Southeastern Ry. Co. v. Mathias*, 50 Ind. 65, 8 Am. Ry. Rep. 381; *Le Baron v. Joslin*, 41 Mich. 313; *Lalor v. Chicago, Burlington & Quincy R. R. Co.*, 52 Ill. 401; S. C. 4 Am. Reps. 616; *Chicago, Burlington & Quincy R. R. Co. v. Damerell*, 81 Ill. 450; *Indianapolis & St. Louis R. R. Co. v. Evans*, 88 Ill. 63, 21 Am. Ry. Rep. 284; *Chicago City Ry. Co. v. Lewis*, 5 Bradw. (Ill.), 242. And this is true even where the doctrine of comparative negligence prevails: *Ind. & St. L. R. R. Co. v. Evans*, *supra*.

<sup>1</sup> *Way v. Illinois Central R. R. Co.*, 40 Ia. 341, 8 Am. Ry. Rep. 400.

*Lehigh Valley R. R. Co. v. Hall*,

61 Penn. St. 361; *Penn. R. R. Co. v. Weber*, 76 *Id.* 157; *Weiss v. Penn. R. R. Co.*, 79 *Id.* 387; *Penn. R. R. Co. v. Weiss*, 87 *Id.* 447; *Penn. R. R. Co. v. Werner*, 89 *Id.* 59; *Waldele v. N. Y. Cent. & H. R. R. R. Co.*, 19 Hun, 69; *Solen v. Va. & Truckee R. R. Co.*, 13 Nev. 152; *Richey v. Mo. Pac. R. R. Co.*, 7 Mo. App. 150.

<sup>3</sup> *Washington & G. Ry. Co. v. Gladmon*, 15 Wall. 401; *Indianapolis & St. Louis R. R. Co. v. Horst*, 3 Otto (93 U. S. Sup. Ct.), 291. See, also, *McQuilken v. Central Pacific R. R. Co.*, 50 Cal. 7, 12 Am. Ry. Rep. 166; *Paducah & Memphis R. R. Co. v. Hoehl*, 12 Bush, 41, 18 Am. Ry. Rep. 338; *Savannah & Memphis R. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451; *Holmes v. Oregon & Cal. R. R. Co.*, 7 Sawyer, 380; S. C. 5 Fed. Repr. 523, 1 Am. & Eng. R. R. Cas. 623; *Hocum v. Weitherick*, 22 Minn. 152; *Hackford v. N. Y. Cent. & H. R. R. R. Co.*, 43 How. Pr. 222; S. C. 58 N. Y. 654; *Kansas Pac. Ry. Co. v. Twombly*, 3 Col. 125; *Cent. Branch Union Pac. R. R. Co. v. Hotham*, 22 Kans. 41; *Weiss v. Penn. R. R. Co.*, 79 Penn. St. 387; *Penn. R. R. Co. v. Werner*, 89 Penn. St. 59; *Richey v. Mo. Pac. R. R. Co.*, 7 Mo. App. 150; *Balt. & Ohio R. R. Co. v. Whitacre*, 35 Ohio St. 627; S. C. 24 *Id.* 642.

of the tender age of seven years,<sup>1</sup> and there was ample evidence of negligence on the part of the railroad company. The charge asked for by the defendant in the court below, bearing immediately upon this point, was as follows: "If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendants, the burden of proof is on the plaintiff to show affirmatively, not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident, or even contributed to it, or that it could have been avoided by the exercise of due care on his own part, then the plaintiff is not entitled to recover, whether the driver was guilty of negligence or not, but the jury must find for defendant."<sup>2</sup> This the court below refused to give. In the Supreme Court, HUNT, Justice, in answer to the alleged error of refusal to give this charge, says: "As applied to *adult* parties, the first branch of this proposition is not correct. While it is true that the absence of reasonable care and caution, on the part of one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care or contributory negligence, as it is termed, is a defence to be proved by the other side."<sup>3</sup> The refusal, to our mind, was correct, on the ground of the tender years of the injured person being such as to exempt such child from the ordinary obligation of due care and caution; but the reason of the opinion, that the burden of proof is, in all cases of like character, of actions for personal injuries, upon the defendant to prove the contributory negligence of the plaintiff, does not seem to have been applicable to the case, especially so, as it is applied in the opinion to cases of adults, whereas the party injured was a mere child. Therefore, with all our respect and veneration for the learning and for the judicial decisions of that high tribunal, when deliberately given on a real point in a case under consideration, we can not, however, regard the avowal in this case, in reference to the burden of proof of contributory

<sup>1</sup> It was the same in *P. & M. R. R. Co. v. Hoehl, supra*.

<sup>2</sup> 15 Wall. 406.

<sup>3</sup> 15 Wall. 406.

negligence as applied to adults, as anything more than a mere *obiter dictum*. The only cases cited to support the same, are *Oldfield v. New York & Harlem R. R. Co.*, 14 N. Y. 310; *Button v. Hudson River Railroad Co.*, 18 N. York, 248; *Johnson v. The Hudson River Railroad Co.*, 20 N. York, 65, and *Wilds v. Same*, 24 N. York, 430. These are all New York cases, and are overruled by 44 New York, 465, and are to the reverse of the leading cases above cited by us to this point.<sup>1</sup>

To justify a recovery on account of negligence, the case must be one of unmixed negligence. If both parties by their negligence contribute immediately to produce the injury, then, where the doctrine of contributive negligence prevails, there can be no recovery.<sup>2</sup> In the language of Lord ELLENBOROUGH, in *Butterfield v. Forrester*, 11 East, 60, "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." It is not necessary, in order to defeat the action, that the plaintiff's negligence shall have brought the injury upon himself; if it directly contribute to it, the action is thereby defeated, where the defendant is only charged with want of ordinary care, and not with an intentional wrong act.<sup>3</sup>

Though a party plaintiff, suing for a personal injury occasioned by the negligence of another, must show that he himself was observing due care to avoid injury, yet he is not bound to do so by positive evidence. The evidence required in that respect need be only of such a character as evidence is ordinarily required to be, and may, as in other cases, consist of circumstances alone, when there is no positive proof, by eye witnesses as to the manner of the occurrence. To require a plaintiff to show due care by positive proof, in all cases, would involve the necessity of making negative proof, as that he did not commit any act of carelessness, or go voluntarily into danger. But when particulars are not at-

<sup>1</sup> *Warner v. The New York Cent. R. Co.*, 44 N. Y. 465.

<sup>2</sup> *Toledo & Wabash R. W. Co. v. Goddard*, 25 Ind. 185; *Indianapolis & Cin. R. R. Co. v. Rutherford*, 29 Ind. 82; *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *S. C. 5 Am. R.*

201; *Gerety v. Phil., Wil. & Balt. R. Co.*, 81 Penn. St. 274, 16 Am. Ry. Rep. 164.

<sup>3</sup> *Lafayette & Ind. R. R. Co. v. Huffman*, 28 Ind. 287; *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335.



tainable, then the usual conduct for carefulness of the party may be shown, in connection with his actions and conduct in reference to the transaction in which the injury occurred, when last seen, and of his manner of then proceeding in respect to carefulness.<sup>1</sup> Such evidence, if of a character to satisfy the mind of a jury, may raise a presumption of care on the part of the injured person; not, however, if such presumption will place the opposite party in the light of committing a wrong act, or crime—then the presumption of innocence repels the same, for the presumption of law is against the commission of crime, or criminal negligence.<sup>2</sup>

The law is well settled that a person has no right to be upon a railroad track, either walking along or otherwise, except at a crossing, and then only in crossing. The track is the private property of the company. It is not built to be walked on, and the fact that it may have been used to walk on, however frequently and commonly, will not change the law in this respect. It does not follow from this, however, that, walking there, one may be wantonly injured by the company;<sup>3</sup> but it does follow, in the language of Justice MILLER, that “being on the private property of the company, on a track which is used for a purpose which is dangerous to human life,” one so situated is “bound to use every precaution, every diligence, every care, against the possibility or probability of any danger”; that, in such case, the servants in charge of a train have “a right to presume” that a man on the track is “of sound mind and good hearing,” and will get off in time to avoid the danger; that the case of a man is not as that of “a child,” or a “dumb man, known” to such servants to be dumb; and that, therefore, the train is not obliged to stop, but is only bound to the ordinary care of warning, by whistling and bell ringing, if the person is seen by the persons in charge of it—which are due to all persons, upon general principles; this done in time for avoiding the danger, the company are not liable.<sup>4</sup>

<sup>1</sup> *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14.

<sup>2</sup> *Rex v. Twynning*, 2 Barn. & Ald. 386; *Williams v. East India Co.*, 3 East, 192; *Rex v. Hawkins*, 10 East, 211; *Hopewell v. De Pinna*, 2 Camp. 113.

<sup>3</sup> *Whalen v. St. Louis, Kansas City & Northern Ry. Co.*, 60 Mo. 323, 9 Am. Ry. Rep. 224; *Isabel v. Hannibal & St. Joseph R. R. Co.*, *Ib.* 475, 9 Am. Ry. Rep. 261.

<sup>4</sup> *Finlayson, Adm'x, v. C., B. & Q. R. R. Co.*, 1 Dillon C. C. R., 579. And

The rule of law, however, that thus requires the injured person, in order to recover, to have used reasonable care and diligence to avoid the injury, does not apply to infants of such tender years as to be incapable of caring for themselves,<sup>1</sup> nor to the very aged, to the disabled, or to the infirm; so that, in proportion as the infancy, infirmity, or other disability, exists in the person of those subjected to dangers, the greater is the duty of those from whom, or whose management or business, the danger proceeds, if such incapacity be known to them, to use increased care to avoid the infliction of an injury.<sup>2</sup>

In the case cited from 65 Penn. St., *Kay v. The Pennsylvania Railroad Company*, the court goes still further, and hold that the negligence of the mother, under the circumstances, if such it be, can not be imputed to the child to prevent a recovery. The

see *Michigan Central R. R. Co. v. Campau*, 35 Mich. 468, 15 Am. Ry. Rep. 314; *Indianapolis & V. R. R. Co. v. McClaren*, 62 Ind. 566; *Toledo, Wabash & Western Ry. Co. v. Jones*, 76 Ill. 311; *Chicago, Burlington & Quincy R. R. Co. v. Damerell*, 81 Ill. 450; *Mobile & M. Ry. Co. v. Blakely*, 59 Ala. 471; *Tanner v. Louisville & Nashville R. R. Co.*, 60 Ala. 621; *Cogswell v. Oregon & C. R. R. Co.*, 6 Ore. 417. And the rule is the same as to an employee: *Mulherrin v. Delaware, Lackawanna & Western R. R. Co.*, 81 Penn. St. 366, 15 Am. Ry. Rep. 456.

<sup>1</sup> *Penn. R. R. Co. v. Kelly*, 31 Penn. St. 372; *Rauch v. Lloyd & Hill*, *Id.* 358; *Phila. & Reading R. R. Co. v. Spearen*, 47 Penn. St. 304; *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *S. C. 3 Am. R.* 628; *Birge v. Gardner*, 19 Conn. 507; *Tanner v. Louisville & Nashville R. R. Co.*, 60 Ala. 621; *Robinson v. Cone*, 22 Vt. 213; *Kenyon v. N. Y. Cent. & H. R. R. Co.*, 5 Hun, 479. And where the deceased is rightfully upon the track, engaged in labor, he can not be charged with negligence if he might have seen an approaching train by reasonable care, as by look-

ing up, or because he did not, when startled, act as others thought he should: *Indianapolis, Bloomington & Western Ry. Co. v. Carr*, 35 Ind. 510, 4 Am. Ry. Rep. 495; *Schultz v. C. & N. W. Ry. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146. Or where he relies upon a custom of the company to ring the bell or sound the whistle whenever approaching workmen on the road: *Goodfellow v. Boston, Hartford & Erie R. R. Co.*, 106 Mass. 461, 8 Am. Ry. Rep. 45; *Schultz v. Chicago & Northwestern Ry. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146; *Ditberner v. Chicago, Milwaukee & St. Paul Ry. Co.*, 47 Wis. 138, 21 Am. Ry. Rep. 37.

<sup>2</sup> But if there be no negligence on the part of the company, then such incapacity or infirmity is no ground of liability. The injury, in such case, is but a misfortune: *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; *Frick v. St. Louis, Kansas City & Northern Ry. Co.*, 5 Mo. App. 435; *Schwieb v. N. Y. Cent. & H. R. R. Co.*, 15 Hun, 572; *Walters v. Chi., Rock Island & Pac. R. R. Co.*, 41 Ia. 71.

court say, it "is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised—as where a parent takes a child into the cars, and by his neglect suffers it to be injured by straying off upon the platform. But here a mother toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track" \* \* \* "When injured by positive negligence, why should it be without redress?"<sup>1</sup>

Negligence, it is said, implies some act of commission or omission wrongful in itself. It is not a wrongful act to make an effort to save human life, if the effort made is compatible with a reasonable regard for one's own safety. The law has so great a regard for human life that it will not impute negligence to an effort to preserve it, if not made under circumstances which, to the judgment of prudent persons, would amount to rashness. To knowingly and voluntarily place one's self in the way of danger, under ordinary circumstances, or merely for the protection or security of property, is negligence, which will prevent a recovery for the injury, if injury be received; but where the exposure is in behalf of human life, it is not negligence, unless it is such as, in the minds of prudent persons, amounts to rashness—recklessness.<sup>2</sup>

The negligence of a superior is not attributable to an inferior working under his control, although the inferior participate in the act, if he does so by order of such superior; and therefore such negligence can not be charged upon the inferior as contributory negligence, so as to defeat him in an action brought for injuries occasioned by such act of negligence.<sup>3</sup> Hence, in Iowa it is holden, where several employes of a railroad company operate a hand-car under control of a "boss," and in the course of such employment one or more of them be injured by reason of

<sup>1</sup> 65 Penn. St. 269, 276, 277, 3 Am. R. 635.

70; *Linnehan v. Sampson*, 126 Mass. 506.

<sup>2</sup> *Eckert v. The Long Island R. R. Co.*, 43 N. Y. 502; S. C. 3 Am. R. 721; *Govt. Str. R. R. Co. v. Hanlon*, 53 Ala.

<sup>3</sup> *Hoben v. The B. & M. R. R. Co.*, 20 Iowa, 562.

the negligence of such boss, or of acts done by his orders, such negligence can not be attributed to those injured, as contributory negligence, to prevent a recovery for the injury.<sup>1</sup>

To detach from the locomotive and send forward a heavily laden car, without a brakeman, upon the grounds ordinarily open to, and frequented by, persons indiscriminately, and where the view is so obstructed as to render it difficult to see its approach, is in itself an act of negligence; but as such negligence is dependent for its existence upon the facts of the case, it therefore becomes a mingled question of law and fact, and is proper for the decision of a jury. The law imposes duties according to circumstances, so that negligence, which consists in a breach of such duty, is a fit subject for the decision of the jury, under instructions of the court as to the principles which are to guide them in their deliberations and conclusion.<sup>2</sup>

In 43 Pennsylvania State Reports, the rule as to contributive negligence is laid down with great force of reason, that if the injured party has such warnings or opportunity of knowledge as would, with ordinary caution, under the circumstances, have saved him from danger, then he is chargeable with knowledge of the danger; and that, failing to use such ordinary care, he can not recover.<sup>3</sup>

And in *Butterfield v. The Western Railroad Co.*, 10 Allen, 532, the fact that the injured party was well acquainted with the highway and railroad, and knowing his approach to it, in a stormy night, and so holding his hat on his head as to obstruct his hearing, and having failed to look for the train, was holden to amount to such palpable negligence that the jury ought to have been instructed that, for want of evidence of due care on his part, the plaintiff was not entitled to recover.

And though negligence is generally a mixed question of law and of fact, yet when the fact from the existence of which it is claimed that the negligence flows, is found by the jury to be

<sup>1</sup> *Hoben v. The B. & M. R. R. Co.*, 20 Iowa, 562.

<sup>2</sup> *Huyett v. Phil. & R. R. Co.*, 23 Penn. St. 373; *Phil. & Reading R. Co. v. Spearen*, 47 Penn. St. 305; *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; S. C. 3 Am. R. 628, 332;

*Wylde v. Northern R. R. Co.*, 53 N. Y. 156, 5 Am. Ry. Rep. 375; *Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172.

<sup>3</sup> *Penn. R. R. Co. v. Henderson*, 43 Penn. St. 449.

true, then its legal character and the consequences flowing therefrom become a matter of law for the court.<sup>1</sup>

It is not only the duty of one in approaching a railway crossing to look along the line of the road and see if a train is coming, but if he fail so to do, or to listen, or to use any other reasonable means of informing himself of approaching danger, such conduct on his part not only amounts, when shown, to proof of negligence, but is in itself negligence, and the court should so charge the jury. In the language of RAY, C. J., of the Supreme Court of Indiana, "The neglect of this duty to use the physical senses is negligence, and not mere evidence of negligence."<sup>2</sup> Nor does it matter to the contrary that the party thinks he may cross with safety, or that he does not think of the cars at all, or of the danger, or that he is in a covered conveyance, and therefore may not see. It is his business to see, to think, and to hear, if he be not in these senses deficient; and if he fails to use such precautions, the consequences must rest upon him.<sup>3</sup>

<sup>1</sup> Toledo & Wabash Ry. Co. v. Goddard, 25 Ind. 185; Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335; S. C. 5 Am. R. 201; Dascomb v. Buffalo & State Line R. R. Co., 27 Barb. 221; Butterfield v. The Western R. R. Co., 10 Allen, 532.

<sup>2</sup> The Bellefontaine Ry. Co. v. Hunter, 33 Ind. 335; S. C. 5 Am. R. 201; St. Louis & Southeastern Ry. Co. v. Mathias, 50 Ind. 65, 8 Am. Ry. Rep. 381; North Penn. R. R. Co. v. Heileman, 49 Penn. St. 60; Dascomb v. Buffalo & State Line R. R. Co., 27 Barb. 221; Wilcox, adm'r, v. Rome, W. & O. R. R. Co., 39 N. Y. 358; Weber v. New York Central & Hudson River R. R. Co., 58 N. Y. 45, 7 Am. Ry. Rep. 188; Bellefontaine Ry. Co. v. Snyder, 24 Ohio St. 670, 7 Am. Ry. Rep. 186; Cleveland, C., C. & I. Ry. Co. v. Elliott, 28 Ohio St. 340; Flemming v. Western Pacific R. R. Co., 49 Cal. 253, 7 Am. Ry. Rep. 265; Hearne v. Southern Pacific R. R. Co., 50 Cal. 482, 12 Am. Ry. Rep. 181; Blaker's Executrix v. The Receivers, etc., 30 N.

J. Eq. 240, 18 Am. Ry. Rep. 81; Lake Shore & Mich. Southern R. R. Co. v. Hart, 87 Ill. 529, 19 Am. Ry. Rep. 249; Brown v. Milwaukee & St. Paul Ry. Co., 22 Minn. 165, 19 Am. Ry. Rep. 298. And in Reynolds v. New York Central & Hudson River R. R. Co., 58 N. Y. 248, 7 Am. Ry. Rep. 6, see this rule applied to a youth of thirteen years of age, overruling the same case in 2 N. Y. S. C. Rep. (T. & C.), 644.

<sup>3</sup> Bellefontaine R. W. Co. v. Hunter, 33 Ind. 335; Chicago & Alton R. R. Co. v. Gretzner, 46 Ill. 74; Toledo, Peoria & Warsaw Ry. Co. v. Head, 62 Ill. 233, 6 Am. Ry. Rep. 232; Dascomb v. The Buffalo & State Line R. R. Co., 27 Barb. 221; Ernst v. Hudson River R. R. Co., 39 N. Y. 61; Baxter v. The Troy & Boston R. R. Co., 41 N. Y. 502; Gerety v. Phil., Wil. & Balt. R. R. Co., 81 Penn. St. 274, 16 Am. Ry. Rep. 164; Blaker's Exec'x v. Receivers, *supra*. But if a party attempt to cross a track by a regular crossing in a city, in the rear of a standing train,

The engineer is not bound to stop his train whenever he sees a man ahead upon a railroad, or some one approaching it; or conveyances standing near by a crossing, headed toward it as if intending to cross; for unless such person on the track is known to the engineer to be deficient in his reason, or some of his senses, or from other infirmity is known to be incapable of using ordinary care and effort to save himself, or clearly presents the appearance of some such deficiency, infirmity, weakness or old age, the engineer must presume that such person will avoid the danger by leaving the track upon the approach of the train. To stop for every such mere possibility of danger, when under the necessity of making time to avoid collision with other trains, would result in danger to the lives of all those confided to his charge.<sup>1</sup> Nor is the rule to be varied by the fact that the engineer neglects to give the ordinary signal—fails to ring the bell or sound the whistle—if the circumstances and surroundings are such that the injured party would know where he was, and of the proximity of the railroad;<sup>2</sup> nor that he could not see along the road any considerable distance, so as to know by sight of an approaching train.<sup>3</sup> The rule is the same under all such circumstances, that the party must avail himself of all his facilities necessary to the use of ordinary caution.

In the case of *Ernst v. Hudson River Railroad Company*, 39 New York, 61, the court, CLERKE, Judge, say: "Any contributory negligence of a person attempting to cross, no doubt ex-

and leading his horse, it is not negligence: *Eaton v. Erie Ry. Co.*, 51 N. Y. 544, 4 Am. Ry. Rep. 524.

<sup>1</sup> *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; S. C. 5 Am. R. 201; *The Philadelphia & Reading R. R. Co. v. Spearen*, 47 Penn. St. 300; *Maher v. Atlantic & Pacific R. R. Co.*, 64 Mo. 267, 17 Am. Ry. Rep. 231.

<sup>2</sup> *The Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; S. C. 5 Am. R. 201; *St. Louis & Southeastern Ry. Co. v. Mathias*, 50 Ind. 65, 8 Am. Ry. Rep. 381; *Telfer, Admr., v. The Northern R. R. Co.*, 30 N. J. 188; *Blaker's Executrix v. The Receivers, etc.*, 30 N. J. Eq. 240, 18 Am. Ry. Rep. 81; *Gale- na & Chicago Union R. R. Co. v.*

*Loomis*, 13 Ill. 548; *Chicago & Miss. R. R. Co. v. Patchin*, 16 Ill. 198; *Gale- na & Chi. Union R. R. Co. v. Dill*, 22 Ill. 264; Ill. Cent. R. R. Co. v. Phelps, 29 Ill. 447; *Beisiegel v. N. Y. Cent. R. R. Co.*, 40 N. Y. 9; *Penn. R. R. Co. v. Henderson*, 43 Penn. St. 449; *Gerety v. Phil., Wil. & Balt. R. R. Co.*, 81 Penn. St. 274, 16 Am. Ry. Rep. 164; *Fletcher v. Atlantic & Pacific R. R. Co.*, 64 Mo. 484, 17 Am. Ry. Rep. 303; *Mceeks v. Southern Pacific R. R. Co.*, 52 Cal. 602, 20 Am. Ry. Rep. 115.

<sup>3</sup> *Central R. R. Co. of N. J. v. Feller*, 84 Penn. St. 226, 18 Am. Ry. Rep. 369.

cuses the company, whether it does or does not use the required signals, or is or is not guilty of any other negligence"; and in the same case, by WOODRUFF, Judge: "A traveler approaching a railroad track is bound to use his eyes and ears, as far as there is opportunity"; and, "Negligence in the railroad company in the giving of signals, or in omitting precautions of any kind, will not excuse his (the traveler's) omission to be diligent in such use of his own means of avoiding danger"; and that omitting to do so is negligence, and should be so peremptorily declared by the court.

But in Missouri, where by statute trains are required to ring the bell and blow the whistle when approaching public crossings of highways, it is held by the supreme court of that state that persons approaching such crossings with intent to cross, who can neither see nor hear any indication of a coming train, are not chargeable as for contributory negligence for acting on the assumption that there is no car or locomotive sufficiently near to render the crossing dangerous; that they may rightfully assume that the handling of the trains will be with ordinary care, and in accordance with the law, and that the usual signals of approach will be seasonably given; and that a defendant may not impute a want of vigilance to a party injured by the defendant's negligence, if that want of vigilance be occasioned by an omission of duty on the part of such defendant.<sup>1</sup>

The rule laid down in some of the cases is that the contributory negligence, in order to defeat the action, must be proximate in contributing to, or bringing about, the injury.<sup>2</sup>

<sup>1</sup>Tabor v. Missouri Valley R. R. Co., 46 Mo. 355; S. C. 2 Am. R. 517; Kennayde v. The Pacific R. R. Co., 45 Mo. 255. See Beisiegel v. N. Y. Cent. R. R. Co., 34 N. Y. 622; S. C. 14 Abb. Pr. (N. S.), 29; Ernst v. Hudson River R. R. Co., 35 N. Y. 9; S. C. 32 Barb. 159; Comm v. Fitchburg R. R. Co., 10 Allen, 189.

<sup>2</sup>Needham v. San Francisco & San Jose R. R. Co., 37 Cal. 409; Kline v. Cent. Pacific R. R. Co. of California, 37 Cal. 400; Fernandes v. Sacramento City Ry. Co., 52 Cal. 45, 9 Am. Ry. Rep. 352; Gates v. Burlington, Ce-

dar Rapids & Missouri River Ry. Co., 39 Iowa, 45, 9 Am. Ry. Rep. 75; Locke v. S. C. & P. Ry. Co., 46 Iowa, 109, 16 Am. Ry. Rep. 138; Whalen v. St. Louis, Kansas City & Northern Ry. Co., 60 Mo. 323, 9 Am. Ry. Rep. 224; Isabel v. Hannibal & St. Joseph R. R. Co., 17, 475, 9 Am. Ry. Rep. 261; Nashville & Chattanooga R. R. Co., and M. & C. R. R. Co., v. Carroll, 6 Heisk. 347, 12 Am. Ry. Rep. 20; Central R. R. Co. of N. J. v. Van Horn, 38 N. J. 133, 13 Am. Ry. Rep. 36; Manly v. Wilmington & Weldon R. R. Co., 74 N. Car. 655, 13 Am.

The same rule of law in that respect should apply to both parties—that is, to the defendant and to the injured party; and the better principle is believed to be, that the negligence of either, in order to charge them respectively, must be proximate, and not remote.<sup>1</sup>

Some authorities go still further, and assume that the injured party is only chargeable with contributory negligence when the injury is the result of his own act alone—that is, unmixed with negligence of the other party; that a person has a right to presume, and to act upon such presumption, that others will do right, will conform to the requirements of the law, and the relative duties of life; and that, failing to do so, if injury result to another in reference thereto, then the injured person may recover for the injury, although he may himself have been wanting in that which would, under other circumstances, be required of him to avoid the imputation of negligence; that notwithstanding his own conduct, yet if no injury would have resulted to him in case the other party had been careful, and in the strict performance of his duty, then such injured person's own conduct, although it places him in the way of being injured, shall not be imputed to him for contributory negligence.<sup>2</sup>

But this doctrine entirely ignores the principles of both contributory and comparative negligence. Whilst it extends immunity to the one party, it holds the other party to an accountability for the conduct of both. It only precludes a recovery

Ry. Rep. 105; *Doggett v. Richmond & Danville R. R. Co.*, 78 N. Car. 305, 16 Am. Ry. Rep. 193; *Wasmer v. Delaware, Lackawanna & Western R. R. Co.*, 80 N. Y. 212; S. C. 1 Am. & Eng. R. R. Cas. 122.

<sup>1</sup> *Maher v. Atlantic & Pacific R. R. Co.*, 64 Mo. 267, 17 Am. Ry. Rep. 231. But see *Jeffersonville, Madison & Indianapolis R. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325.

<sup>2</sup> *Shearman & Redfield on Negligence*, 37, Sec. 31; *Reeves v. Delaware, Lackawanna & W. R. R. Co.*, 30 Penn. St. 454; *Newson v. N. Y. Cent. R. R. Co.*, 29 N. Y. 383; *Ernst v. Hudson River R. R. Co.*, 35 N. Y. 9; *Cleve-*

*land, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172; *Manly v. Wilmington & Weldon R. R. Co.*, 74 N. Car. 655, 13 Am. Ry. Rep. 105; *Karle v. Kansas City, St. Joseph & Council Bluffs R. R. Co.*, 55 Mo. 476; *Meyers v. Chicago, Rock Island & Pac. R. R. Co.*, 59 Mo. 223; *Balt. & Ohio R. R. Co. v. Mulligan*, 45 Md. 486; *Radley v. London & N. W. Ry. Co.*, Law Rep. 1 App. Cas. 754; *Murphy v. Chicago, Rock Island & Pac. R. R. Co.*, 33 Ia. 539; S. C. 45 Ia. 661; *Richmond & Danville R. R. Co. v. Anderson*, 31 Gratt. 812; *Kans. Pac. Ry. Co. v. Cranmer*, 4 Col. 524.



when the entire negligence is on the part of the injured party, as that there was no negligence of the other to contribute to it. The more correct principle is, that a party can not expose himself with impunity to injury from the possible negligence of another, and if injury ensue, recover against the other for such injury. Each is bound to ordinary care, and the one, if only one, that omits it, must take the consequences by way of legal liability. If both are culpable, and such mutual culpability contribute to an injury, neither is liable, where the doctrine of contributory negligence prevails.<sup>1</sup>

The settled principles of the law would seem to require that the plaintiff, relying on the negligence of the defendant to recover for a personal injury, must allege in his pleadings that he himself was observing due care. Yet such is not the law;<sup>2</sup> and it is held in Wisconsin that an averment of the plaintiff that the injury was caused by the negligence of the defendant, is tantamount to an averment that the defendant's negligence was the sole cause of the injury, and therefore renders it unnecessary to state that plaintiff used reasonable or ordinary care to prevent it.<sup>3</sup>

It is held to be negligence for a railroad company to suffer weeds or other growths to accumulate on and along its right of way, at and near to a public crossing, in such a manner and to such an extent as to so obstruct the view, so that those operating its trains can not conveniently see persons and animals

<sup>1</sup> *Button v. Hudson River R. R. Co.*, 18 N. Y. 248; *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 65; *Brand v. Schenectady & Troy R. R. Co.*, 8 Barb. 368.

<sup>2</sup> *Thompson v. North Mo. R. R. Co.*, 51 Mo. 190; *Loyd v. Hannibal & St. Joseph R. R. Co.*, 53 Mo. 509, 12 Am. Ry. Rep. 474; *Texas & Pacific Ry. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319; *Louisville & P. C. Co. v. Murphy*, 9 Bush, 522; *Paducah & Memphis R. R. Co. v. Hoehl*, 12 Bush, 41, 18 Am. Ry. Rep. 338; *Hocum v. Weitherick*, 22 Minn. 152; *Robinson v. Western Pac. R. R. Co.*, 48 Cal. 409; *State v. Manchester & L. R. R. Co.*, 52 N. H. 528; *Hackford v.*

*N. Y. Cent. & H. R. R. R. Co.*, 43 How. Pr. 222, 53 N. Y. 654; *Snyder v. Pittsburg, C. & St. L. Ry. Co.*, 11 W. Va. 14; *Govt. Str. R. R. Co. v. Hanlon*, 53 Ala. 70; *Balt. & Ohio R. R. Co. v. Whittington*, 30 Gratt. 805.

<sup>3</sup> *Potter, Admr., v. The Chicago & N. Western Ry. Co.*, 20 Wis. 533. And see *Lalor v. C., B. & Q. R. R. Co.*, 52 Ill. 401; *Indianapolis & St. L. R. R. Co. v. Evans*, 88 Ill. 63; *Indianapolis, P. & C. R. R. Co. v. Keely*, 23 Ind. 183; *Jeffersonville, Madison & Ind. R. R. Co. v. Hendricks*, 41 Ind. 48; *Jackson v. Indianapolis & St. L. R. R. Co.*, 47 Ind. 454.

approaching to cross, or in the act of crossing, the railroad at such public crossings; and if, by reason of such obstructions, injuries occur at such crossing, the company will be liable.<sup>1</sup> And it is laid down as a rule of law in the same case here cited, that it is the duty of railroad companies to keep their right of way grounds sufficiently free from obstructions that persons approaching public crossings may ascertain whether there is danger in crossing, and so that the employes in charge of trains may be able to see if there be persons or property on, or passing on to, the track.<sup>2</sup>

And so neglecting to give the customary signals, as also the absence of watchmen at public crossings of streets in towns and cities, is negligence;<sup>3</sup> and where such omissions occur on the part of the company, the party injured is not held, if in Illinois, where comparative negligence prevails, to the same measure of diligence on his part that is incumbent on him elsewhere under ordinary circumstances.<sup>4</sup>

If one attempt to get on or off a train while it is in motion, such an attempt is negligence, if done at his own instance, without any inducement from those in charge thereof; and if injury result therefrom, without any fault of the company, there can be no recovery, nor for injury to a child of tender years injured under the same circumstances, while in charge of an adult person so attempting with such infant to leave the train whilst in motion,

<sup>1</sup> Rockford, Rock Island & St. Louis R. R. Co. v. Hillmer, 72 Ill. 235; Indianapolis & St. Louis R. R. Co. v. Smith, 78 Ill. 112; Dimick v. Chi. & N. W. Ry. Co., 80 Ill. 338; Chi., Burlington & Quincy R. R. Co. v. Lee, 87 Ill. 454.

<sup>2</sup> Indianapolis & St. Louis R. R. Co. v. Smith, 78 Ill. 112.

<sup>3</sup> St. Louis, Vandalia & Terre Haute R. R. Co. v. Dunn, admr., 78 Ill. 197; McGovern v. N. Y. Cent. & H. R. R. Co., 67 N. Y. 423; Dolan v. Del. & Hudson Canal Co., 71 N. Y. 285; Casey v. N. Y. C. & H. R. R. Co., 78 N. Y. 518; S. C. 8 Daly, 220, and 6 Abb. N. C. 104; Phila. & Reading R. R. Co. v. Kilhips, 88 Penn. St. 405.

But it is held in McGrath v. New York Central & Hudson River R. R. Co., 59 N. Y. 468, 7 Am. Ry. Rep. 106, reversing the same case in 1 Hun, 437, and 3 N. Y. S. C. (T. & C.), 776, that the absence of a flagman at a crossing, when it had been customary to keep one there, does not relieve a traveler from the effects of his negligence; and in Weber v. New York Central & Hudson River R. R. Co., 58 N. Y. 45, 7 Am. Ry. Rep. 188, that the failure to station flagmen, or erect gates, at a crossing in a city, is no evidence of negligence, unless required by law.

<sup>4</sup> St. Louis, Vandalia & Terre Haute R. R. Co. v. Dunn, admr., 78 Ill. 197.

the company being guilty of no negligence. In such case, the negligence of the parent or person in charge of the child being the proximate cause of the injury to it and to himself, no recovery can be had against the company by either.<sup>1</sup>

In an action against a railroad company for a personal injury, it must be averred by the plaintiff that there was no fault or negligence on the part of the injured person;<sup>2</sup> and by a parity of reasoning and sequence of the law, if the action be for injury to a child of tender years, then the averment in that respect must be that the injury occurred without the fault or negligence of the parent or child, or an averment substantially to that effect. In either case, the facts averred must of course be proved; the plaintiff must recover, if at all, *allegata et probata*.

In California, the latest ruling we have met with is the contrary of the general doctrine in respect to averment and proof of care on the part of the plaintiff. The ruling there is that negligence on the part of the plaintiff is a matter of defense, to be proved affirmatively by the defendant, unless it can be inferred from circumstances proved by the plaintiff;<sup>3</sup> and that in actions for personal injury, the plaintiff need not allege in his declaration or petition that the injury was committed without his fault.<sup>4</sup> But notwithstanding such ruling, yet the general principle is there maintained that contributive negligence on the part of the injured person in any degree contributing proximately to bring about the injury, defeats the action.<sup>5</sup> And the

<sup>1</sup> Chi. & Alton R. R. Co. v. Randolph, 53 Ill. 510; Ill. Cent. R. R. Co. v. Slatton, 54 Ill. 133; Ohio & Miss. Ry. Co. v. Stratton, 78 Ill. 88; Lake Shore & Mich. S. Ry. Co. v. Roy, 5 Bradw. (Ill.), 82; Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's admr., 27 Ind. 513; Morrison v. Erie Ry. Co., 56 N. Y. 302, 6 Am. Ry. Rep. 166; Harvey v. Eastern R. R. Co., 116 Mass. 269, 7 Am. Ry. Rep. 463; Galveston, H. & S. A. R. R. Co. v. Legierse, 51 Tex. 189; Nelson v. Atlantic & Pac. R. R. Co., 68 Mo. 593; Richmond & D. R. R. Co. v. Morris, 31 Gratt. 200; Knight v. Pontchartrain R. R. Co., 23 La. Ann. 462. But the mere leaving the seat, for the purpose

of getting off, is not negligence: Wyld v. Northern R. R. Co., 53 N. Y. 156, 5 Am. Ry. Rep. 375.

<sup>2</sup> Mich. S. & N. Indiana R. R. Co. v. Lantz, 29 Ind. 528; but see *ante*, p. 1035. A general averment of defendant's negligence is sufficient: St. Louis & Southeastern Ry. Co. v. Mathias, 50 Ind. 65, 8 Am. Ry. Rep. 381.

<sup>3</sup> Robinson v. The Western Pacific R. R. Co., 48 Cal. 409, 426; and this ruling is affirmed in McQuilken v. Central Pacific R. R. Co., 50 Cal. 7, 12 Am. Ry. Rep. 166.

<sup>4</sup> Robinson v. The Western Pacific R. R. Co., 48 Cal. 409, 426.

<sup>5</sup> Gay v. Winter, 34 Cal. 153; Needham v. San Francisco & San Jose R.

rule does not prevent the court from ordering a non-suit in a proper case, that is, if the plaintiff's evidence shows him guilty of such negligence as will defeat his recovery.<sup>1</sup>

It is also held in that state, that leaving a team of horses unhitched in close proximity to a railroad is such negligence as to prevent recovery for their injury;<sup>2</sup> and if the owner on the passing of a train runs upon the track for the purpose of stopping the team, and is there himself injured, he can not recover.<sup>3</sup>

In actions for injuries alleged to have been caused by the negligence of the defendant, if the entire evidence fails to show any such negligence, the court should either non-suit the plaintiff, or instruct the jury to find for the defendant.<sup>4</sup> And if the plaintiff's evidence shows him to be guilty of negligence contributing directly to the injury, a non-suit is proper;<sup>5</sup> or if, the burden of

R. Co., 37 Cal. 419; *Robinson v. The Western Pacific R. R. Co.*, 48 Cal. 409, 421; *Hearne v. Southern Pacific R. R. Co.*, 50 Cal. 482, 12 Am. Ry. Rep. 181.

<sup>1</sup> *McQuilken v. Cent. Pac. R. R. Co.*, *supra*.

<sup>2</sup> *Deville v. Southern Pacific R. R. Co.*, 50 Cal. 383, 12 Am. Ry. Rep. 180.

<sup>3</sup> *Deville v. So. Pac. R. R. Co.*

<sup>4</sup> *Wilds, admx., v. The Hudson River R. R. Co.*, 24 N. Y. (10 Smith), 430; S. C. 29 N. Y. 315, 33 Barb. 503; *Sutton v. N. Y. Cent. & H. R. R. Co.*, 66 N. Y. 243; *Steffen v. Chicago & Northwestern R. R. Co.*, 46 Wis. 259, 21 Am. Ry. Rep. 385. See also *Keeley v. Erie Ry. Co.*, 47 How. Pr. 256; *Maher v. Atlantic & Pac. R. R. Co.*, 64 Mo. 267; *Daniel v. Metropolitan Ry. Co.*, Law Rep. 5 H. L. 45, Law Rep. 3 Com. P. 216; *Bridges v. North London Ry. Co.*, Law Rep. 7 H. L. 213; *Welfare v. London & B. Ry. Co.*, Law Rep. 4 Q. B. 693; *Lewis v. London, C. & D. Ry. Co.*, Law Rep. 9 Q. B. 66; *Stubley v. London & N. W. Ry. Co.*, Law Rep. 1 Exch. 13; *Slattery v. Dublin, W. & W. Ry. Co.*,

Irish Rep. 8 C. L. 531, and 10 C. L. 256; *Dublin, W. & W. Ry. Co. v. Slattery*, Law Rep. 3 App. Cas. 1155.

<sup>5</sup> *Delaware, Lackawanna & Western R. R. Co. v. Toffey*, 38 N. J. 525, 13 Am. Ry. Rep. 75; *Bonnell v. Delaware, Lackawanna & Western R. R. Co.*, 39 N. J. 189, 14 Am. Ry. Rep. 220; *Brown v. Milwaukee & St. Paul Ry. Co.*, 22 Minn. 165, 19 Am. Ry. Rep. 298; *Donaldson v. Same*, 21 *Id.* 293, 20 Am. Ry. Rep. 15; *Goldstein v. Chicago, Milwaukee & St. Paul Ry. Co.*, 46 Wis. 404, 21 Am. Ry. Rep. 391; *Pennsylvania R. R. Co. v. Fortney*, 90 Penn. St. 323; S. C. 1 Am. & Eng. R. R. Cas. 128; *Clark v. Boston & Albany R. R. Co.*, 128 Mass. 1; S. C. 1 Am. & Eng. R. R. Cas. 134; *Wills v. Lynn & Boston R. R. Co.*, 129 Mass. 351; *Balt. & Ohio R. R. Co. v. Shipley*, 31 Md. 368; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438; *Dublin, W. & W. Ry. Co. v. Slattery*, Law Rep. 3 App. Cas. 1155, Irish Rep. 8 C. L. 531, and 10 C. L. 256; *Penn. Co. v. Rathgeb*, 32 Ohio St. 66. The contributory negligence, however, should clearly appear: *Hackford v. N. Y. Cent. & H.*

proof being upon him, he produces no evidence of due care on his part.<sup>1</sup> But if the law has imposed upon railroad companies a general presumption of negligence in case of accident, and the testimony for the plaintiff discloses contributory negligence by him, if there is room for reasoning as to whether such general presumption of negligence is rebutted by the evidence, or whether the negligence of the plaintiff was proximate, a non-suit should not be granted.<sup>2</sup>

The rule of contributive negligence prevails substantially in the courts of Louisiana, and under the code of that state.<sup>3</sup> In

R. R. Co., 53 N. Y. 654; Belton v. Baxter, 54 N. Y. 245, 58 N. Y. 411; Massoth v. Del. & H. C. Co., 64 N. Y. 524; Waldele v. N. Y. Cent. & H. R. R. Co., 19 Hun, 69; Murphy v. Chicago, Rock Island & Pac. R. R. Co., 45 Ia. 661, 38 Ia. 539; McMahon v. Northern Cent. Ry. Co., 39 Md. 438; Cogswell v. Oregon & Cal. R. R. Co., 6 Oreg. 417; Bunting v. Cent. Pac. R. R. Co., 14 Nev. 351; Cohen v. Eureka & P. R. R. Co., *Id.* 376; Ellis v. Great Western Ry. Co., Law Rep. 9 C. P. 551. In the case of Goldstein v. C., M. & St. P. Ry. Co., *supra*, it was attempted to charge the defendant with negligence in leaving a narrow passage way between its depot and a canal undefended by a railing, into which the plaintiff voluntarily drove, and was precipitated into the canal. On demurrer, the complaint was held insufficient.

<sup>1</sup> *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257; *Cordell v. N. Y. Cent. & H. R. R. Co.*, 64 N. Y. 535, 70 *Id.* 119, 75 *Id.* 330.

<sup>2</sup> *Hankerson v. South Western R. R. Co.*, 59 Ga. 593, 18 Am. Ry. Rep. 458.

<sup>3</sup> *Carlisle v. Holton*, 3 La. An. 48; *Damont v. New Orleans & Carrollton R. R. Co.*, 9 La. An. 441; *Mercier v. The N. Orleans & Carrollton R. R. Co.*, 23 La. An. 264; *Knight v. Pontchartrain R. R. Co.*, 23 La. An. 462.

A very lucid and full analysis of the law of negligence is given by said Supreme Court in this last case, as the same prevails in Louisiana, viz: HOWE, J.

"There is a rule of law, too well settled to be disturbed, that is invoked by defendant—the rule *volenti non fit injuria*. The extent and application of this rule have been discussed at length in this controversy, and it seems that the numerous decisions cited may be distributed into three classes:

"*First*—Where the conduct of plaintiff has as matter of fact contributed to the accident, but such conduct has not been in a legal sense imprudent or negligent. In such case the plaintiff may recover from a defendant in fault. Such was considered the state of facts in *Choppin v. The Carrollton Railroad*, 17 An. 19, as appears from the record, though not from the published report.

"*Second*—Where the conduct of the plaintiff has been imprudent or negligent, but such imprudence or negligence has not contributed to the accident. In such case the plaintiff may recover from a defendant in fault.

"*Third*—Where the conduct of plaintiff has been negligent and has contributed to the disaster. In such case the plaintiff can not recover, even though the defendant be in fault.

the leading case here cited there was a verdict and judgment for plaintiff, in an action for death incurred by an effort to get upon a moving train; and there being no evidence of any fault on the part of the company, the supreme court reversed the judgment, set aside the verdict, and ordered that judgment be given for defendant, with costs, in the court below, in chief.

And so the negligence of the plaintiff's own employe or servant, as for instance his wagon driver, in bringing about a collision with a railroad train, whereby the plaintiff is injured, is a bar to plaintiff's recovery for the injury, in like effect as if resulting from the negligence of plaintiff himself;<sup>1</sup> and this, too, though the company be also negligent.<sup>2</sup> In such cases the burden of proof is upon the plaintiff to show due care.<sup>3</sup> So, in like manner, of plaintiff's own conduct in a suit by him, or that of the injured party, if the suit be by his administrator.<sup>4</sup>

Resistance to an improper manner and place of putting one forcibly off the cars will not amount to contributive negligence.<sup>5</sup> A party being forcibly ejected from a moving car, whether he has a right to be thereon or not, has the same right to resist as if under an attack which places his life in danger; and will not be held to have contributed to an injury received in such rencontre.<sup>6</sup>

Where the company is liable for the act of its conductor in

Such was either the state of facts or the doctrine announced in the following cases: *Fleytas v. Pontchartrain Railroad*, 18 L. 339; *Hubgh v. Carrollton Railroad*, 6 An. 496; *Damont v. Same*, 9 A. 441; *Hill v. N. O., Opelousas & G. W. Railroad*, 11 An. 292; *Myers v. Perry*, 1 An. 374; *Carlisle v. Holton*, 3 An. 48; *Murphy v. Diamond*, 3 An. 441.

The case at bar is clearly within the last class. \* \* \* It is therefore ordered that the judgment appealed from be reversed, and the verdict set aside. It is further ordered that there be judgment in favor of defendant with costs." (P. 464.)

<sup>1</sup> *Lake Shore & Mich. S. R. R. Co. v. Miller*, 25 Mich. (3 Post), 274.

<sup>2</sup> *Lake Shore & Mich. S. R. R. Co. v. Miller*, 25 Mich. (3 Post), 274.

<sup>3</sup> *Lake Shore & Mich. S. R. R. Co. v. Miller*, 25 Mich. (3 Post), 274; *Mich. Cent. R. R. Co. v. Coleman and another*, 28 Mich. (6 Post), 440; *Le Baron v. Joslin*, 41 Mich. 313; *ante*, p. 1023.

<sup>4</sup> *Detroit & Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. (4 Jennison), 99; *Kelly, admr., v. Hendrie*, 26 Mich. (4 Post), 255; *Schappert v. Ringler*, 45 N.Y. Superior, 345; *Patterson v. B. & M. R. R. Co.*, 38 Ia. 279; *Murphy v. Chi., R. I. & P. R. R. Co.*, 45 Ia. 661; *S. C.* 38 Ia. 539.

<sup>5</sup> *Sanford v. Eighth Avenue R. R. Co.*, 23 N. Y. (9 Smith), 343.

<sup>6</sup> *Sanford v. Eighth Avenue R. R. Co.*, *supra*.

that he wrongfully expels a passenger from the car, it is also liable for any aggravating circumstances attending the same.<sup>1</sup>

In New York the doctrine of contributive negligence is asserted and enforced in the earliest railroad case that has come to our knowledge, decided in the Court of Appeals of that state. That court laid down therein the broad principle that where the injury results "from the common fault of both parties" there can be no recovery.<sup>2</sup> This was a case of killing live stock, which had strayed by the negligence of the owner on to the defendant's railroad, and were there killed by the negligence of the company's servants, when they might have been saved by ordinary care. The Court of Appeals held that being trespassers there, the company were not bound to check up the train, or bound in any form to ordinary care; that the cattle being upon the railroad without right, the law imputed a fault to the plaintiff, and no recovery could be had.<sup>3</sup> In the subsequent case of *Hance and another v. The Cayuga & Susquehanna Railroad Company*, the same court hold, under the statute requiring railroads to be fenced, and making companies liable on default thereof for live stock injured thereon, that where a railroad company properly fences its road it is not liable for injury to live stock, except for negligence or willful injury;<sup>4</sup> and so previously in *Corwin v. The New York & Erie Railroad Company*.<sup>5</sup> In each of said cases it is also ruled that even then there can be no recovery or liability if the injury is in part owing to the contributory negligence of the plaintiff; that where both parties were negligent there could be no recovery, although the company's negligence consisted in omitting to keep its fences and cattle-guards in proper repair, whereby the animals got on the track—the plaintiff on his part being guilty of negligence in allowing his

<sup>1</sup> *Sanford v. 8th Ave. R. R. Co.*, *supra*; *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202.

<sup>2</sup> *Munger v. The Tonawanda R. R. Co.*, 4 N. Y. (Comstock), 349, 358, 359, 360. In this case, though the doctrine involved was extensively reviewed and summed up by the court and counsel, yet no railway case is cited, either English or American, but

the case of *Cook v. The Champlain Transportation Co.*, and that is cited to the point that the rule that a plaintiff who is a wrongdoer can not recover, has exceptions.

<sup>3</sup> *Munger v. The Tonawanda Railroad Co.*, 4 N. Y. (Comstock), 349, 358.

<sup>4</sup> 26 N. Y. (12 Smith), 428.

<sup>5</sup> 13 N. Y. (3 Kernan), 42.

cattle to stray thereon;<sup>1</sup> and that suffering the animals to be at large and to go upon the road, whether intentional or not, is negligence, was held in *Munger v. The Tonawanda R. R. Co.*, 4 N. Y. (4 Comst.), 349.

But it is held that a passenger upon a vehicle provided for that purpose, may rightly assume that those parts of the vehicle prepared for the use of passengers are suitable and safe, and that those in charge of the conveyance will avoid any special risks attaching to the position.<sup>2</sup> Thus where a passenger takes an exposed position (in this case a footboard provided for that purpose), he is not guilty of negligence *per se*, but the question of his contributory negligence is for the jury.<sup>3</sup>

The courts of Kentucky, whilst adopting some of the principles of contributive negligence, and some also of comparative negligence, so termed, seemed to have carved out a system, in reference thereto, in some respects peculiarly their own. Their ruling is: *First.* That as between the company and strangers, the company is bound to the observance of ordinary care, and are therefore liable for injuries resulting from the want of it to one not himself by fault contributing thereto;<sup>4</sup> and this is consonant to the generally received principles in that respect. *Second.* That in respect to injuries to strangers resulting from the act of negligence of common laborers employed by it, the company are liable if the act done be within the course of their duty or employment,<sup>5</sup> and the injured party do not contribute to the cause thereof; and this is in conformity, as is believed, to the generally received doctrine of courts on this subject. *Third.* That in the business of operating trains—the impelling of them, we suppose, is meant—the engineer is the chief or governing agent of the corporation, and that all his associates in that employment, as firemen and brakemen, we suppose, are employes in a common service; that through him and its other agents, the invisible corporation, though never actually, yet is always constructively, present; and that their acts in their several spheres are its acts, and for which, if negligent, and injury result

<sup>1</sup> *Hance v. Cayuga & Susquehanna R. R. Co.*, 26 N. Y. (12 Smith), 428.

<sup>2</sup> *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230, 6 Am. Ry. Rep. 198.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Louisville & Nashville R. R. Co. v. Collins*, 2 Duvall, 114.

<sup>5</sup> *Louisville & Nashville R. R. Co. v. Collins*, 2 Duvall, 114.



therefrom to one of those common or subordinate servants, the company is liable, if the injured party be not himself negligent; and although he be himself negligent, that yet the company are liable if the act of the agent be one of gross negligence, and such that by ordinary care the injury might have been avoided.<sup>1</sup> We understand by the term gross negligence, as used in the courts of Kentucky, that which is tantamount to willfulness—negligence so great as to justify the inference of willfulness, or at least to raise the presumption of total disregard of consequences as to the effect of the act, omission, or conduct complained of.<sup>2</sup> And that for an injury incurred by one of those common servants, or co-equal employes, engaged about the running of trains, they all being subordinate, and all engaged in the same line of business, when caused by reason of the negligence of another one or more of them, there is no liability of the company, if proper caution is used in their selection and employment; and that thus far only the English rule in respect to injuries to employes from negligence of each other is recognized in the courts of Kentucky.<sup>3</sup>

And in regard to injuries to passengers, the rule laid down in Kentucky is, that if the injury results from the passenger's own fault exclusively, then he can not recover; if from the negligence of both himself and the company, then he can not recover unless the servant or agent of the company sees the impending danger, and might, but does not, avoid it by resorting to ordinary care on his part.<sup>4</sup> And when there is a conflict of testimony, the question of fact is then for the jury to decide;<sup>5</sup> and compensatory

<sup>1</sup> Louisville & Nashville R. R. Co. v. Collins, 2 Duvall, 114; Same v. Robinson, 4 Bush, 507; Louisville & Nashville R. R. Co. v. Filbern's admx., 6 Bush, 574; Louisville, Cincinnati & Lexington R. R. Co. v. Mahony's admx., 7 Bush, 235; Louisville, Cincinnati & Lexington R. R. Co. v. Cavens's admr., 9 Bush, 559. And as between a train-dispatcher and an engineer on a train *en route*, there is not the service of co-equal employes, and for injury to the latter by reason of the former's negligence the company are liable: Louisville, Cincinnati & Lexington R. R. Co. v. Cavens's

admr., *supra*. And so, also, where by the negligence of the conductor of one train an injury is inflicted upon the engineer of another train *en route* upon the road: *Ib*.

<sup>2</sup> Louisville, Cincinnati & Lex. R. R. Co. v. Mahony's admx., 7 Bush, 235, 239.

<sup>3</sup> Louisville & Nashville R. R. Co. v. Collins, 2 Duvall, 114; Louisville, Cincinnati & Lexington R. R. Co. v. Cavens's admr., 9 Bush, 559.

<sup>4</sup> Kentucky Central R. R. Co. v. Dills, 4 Bush, 593.

<sup>5</sup> Louisville & Nashville R. R. Co. v. Collins, 2 Duvall, 114.

damages is the rule, unless there is gross negligence or wantonness.<sup>1</sup>

Some writers and jurists hold, when there is no evidence to show which party was in fault in causing an injury resulting from negligence, that the presumption is that the injured party was observing proper care, inasmuch as the law presumes that persons ordinarily look to their own safety and interests; but this presumption must give way and cease when the result of it would be to raise the inference of crime or negligence against the other party: for the presumption of law is against the commission of crime, and injuries inflicted by negligence, especially those causing a person's death, are criminal injuries.<sup>2</sup>

**3. Comparative negligence.**—The doctrine of comparative negligence is predicated upon the relative care, or want of care, of the parties. It weighs their actions and conduct in connection with all the circumstances and surroundings of each particular case, and decides accordingly.<sup>3</sup> We are unable to give any definition of our own of the principle so satisfactory as that given by the learned Justice BRESEE, of the Supreme Court of Illinois, where this doctrine, as in Georgia, prevails. After referring to several cases involving the subject, the learned judge says: "It will be seen, from these cases, that the question of liability does not depend absolutely on the absence of all negligence on the part of the plaintiff, but upon the relative degree of care, or want of care, as manifested by both parties; for all care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine, therefore, we think is, that in proportion to the negligence of the defendant, should be measured the degree of care required of the plaintiff—that is to say, the more gross the negligence manifested by the defendant, the less degree of care will be required of the plaintiff to enable him to recover." And that "where there are

<sup>1</sup> Kentucky Central R. R. Co. *v.* Dills, 4 Bush, 593; Louisville & Nashville R. R. Co. *v.* Sickings, 5 Bush, 1; Louisville & Portland R. R. Co. *v.* Smith, 2 Duvall, 556.

<sup>2</sup> *Rex v. Twynning*, 2 Barn. & Ald. 386.

<sup>3</sup> Galena & Chicago Union R. R. Co.

*v.* Jacobs, 20 Ill. 478. Where the negligence of defendant is proximate to the cause of injury, and that of plaintiff remote, it is held, in Maryland, that plaintiff may recover: *Balt. & O. R. R. Co. v. State*, 33 Md. 542; *Balt. & O. R. R. Co. v. State*, use, etc., 36 Md. 366.

faults on both sides, the plaintiff shall recover, his fault being to be measured by the defendant's negligence, the plaintiff need not be wholly without fault." <sup>1</sup> And so in Kansas, the supreme court of that state, VALENTINE, J., say: "If their (the plaintiffs) negligence is slight and that of the defendants is gross, or if theirs is remote and that of the defendants is the proximate cause of the injury, they may recover, notwithstanding their own slight or remote negligence." <sup>2</sup>

In Illinois, where the doctrine of comparative negligence prevails, <sup>3</sup> it is holden that where a railroad company leaves cars standing alongside a passenger track, so close thereto that the arm of a passenger, slightly projecting from a window in a passenger car so constructed that the windows may be opened, is struck thereby, is guilty of such gross negligence that the passenger may recover for the injury, notwithstanding his own negligence in allowing his arm to protrude beyond or out of the window of the car in which he is seated, so as to be struck by or come in contact with the standing car thus negligently left upon the adjacent track. <sup>4</sup>

The Supreme Court of Illinois, WALKER, J., in the case just cited from 51 Illinois, say: "The question then arises, whether, having the arm casually outside of the car in that manner, was negligence, and if so, was there greater negligence in the company in permitting its freight cars to stand so near the track as to produce the injury in the manner we suppose it occurred; and if both parties were guilty of negligence, was that of appellee relatively slight when compared with that of appellant? For a passenger to allow his arm to rest on the window sill, and slightly project beyond the outside surface of the car, may be, in some degree, negligence, but observation teaches that to do so is not uncommon with passengers." That court then add that "The

<sup>1</sup> Galena & Chicago Union R. R. Co. v. Jacobs, 20 Ill. 478, 496.

<sup>2</sup> Union Pac. R. W. Co. v. Rollins, 5 Kansas, 167, 184.

<sup>3</sup> Chi. & Rock Island R. R. Co. v. Still, 19 Ill. 499; Galena & Chi. Union R. R. Co. v. Jacobs, 20 Ill. 478; St. Louis, Alton & Terre Haute R. R. Co. v. Todd, 36 Ill. 409; Chi. & Alton R. R. Co. v. Hogarth, 38 Ill. 370; Chi.

& Alton R. R. Co. v. Pondrom, 51 Ill. 333; S. C. 2 Am. R. 306; Chi. & N. W. R. R. Co. v. Sweeney, 52 Ill. 330.

<sup>4</sup> Chi. & Alton R. R. Co. v. Pondrom, 51 Ill. 333. And see, in accord herewith, Spencer v. Milwaukee & Prairie du Chien R. R. Co., 17 Wis. 487; Miller v. St. Louis R. R. Co., 5 Mo. App. 471.

established doctrine of this court is, that where the negligence of the plaintiff is slight as compared with that of the defendant, a recovery may nevertheless be had."<sup>1</sup>

In the case of *Spencer v. The Milwaukee & Prairie du Chien Railroad Company*, the Supreme Court of Wisconsin, in disposing of a similar case to the one cited from 51 Illinois, use the following terms: "Then to say that if a passenger's arm extends the slightest degree beyond the outside surface, he is wanting in proper care and attention, and that if an injury happens, he can not recover, because his conduct must have necessarily contributed to the result, appears to us to be laying down a very arbitrary and unreasonable rule of law. It is probably the habit of every person while riding in the cars to rest the arm upon the base of the window. If the window is open, it is liable to extend slightly outside. This we suppose is a common habit."<sup>2</sup>

In *Laing v. Colder and others* it is ruled, in Pennsylvania, that permitting the hand to be outside the car window is negligence that will prevent a recovery; but in that case warning had been given by the conductor to the passengers against putting out their hands.<sup>3</sup>

In a similar case in Pennsylvania, the supreme court of that state hold that to have passenger cars in use without any means of preventing the thrusting of the limbs of passengers out of the windows, is the use of cars that are not "roadworthy," and that a carrier is responsible for injuries that may happen from that cause alone; that in using such cars it becomes the duty of the company to use every means, in dangerous places, to guard against injury to passengers, by audibly proclaiming in such cars the necessity of keeping arms and heads inside; and that if, heedless of such warning, a passenger is injured by thus exposing a limb or limbs, he incurs the charge of willful negligence, and can not recover.<sup>4</sup>

In Illinois it is well settled that although a plaintiff be guilty of negligence, still the defendant will be held liable if his negligence is greater than that of the plaintiff; that negligence resulting in injury is comparative, and it is not required that

<sup>1</sup> *Chi. & Alton R. R. Co. v. Pondrom*, 51 Ill. 333, 337.

<sup>2</sup> 17 Wis. 487, 494.

<sup>3</sup> *Laing v. Colder and others*, 8 Penn.

St. 479.

<sup>4</sup> *The New Jersey R. R. Co. v. Kennard*, 9 Harris (21 Penn. St.), 203.

the plaintiff shall be free from all negligence, or that he shall exercise the highest possible degree of prudence and caution, to entitle him to a recovery, if the defendant be guilty of a higher degree of negligence.<sup>1</sup>

And the fact of negligence in a person crossing a railroad track, will not authorize his being wantonly injured;<sup>2</sup> but if he so act that it is not in the power of the engineer to avoid the injury by reasonable diligence, the company is not liable.<sup>3</sup>

In Georgia, as before stated, the rule of comparative negligence prevails. If the negligence is concurrent and equal between the company and party injured, the plaintiff can not recover; and so if the injury is by the consent of the party injured; so, also, if the negligence of the injured party is gross, and that of the company but slight in comparison, or the injured party by ordinary care might have avoided the injury. If both parties are in fault, and that of plaintiff be not such as to preclude a recovery, then the damages are estimated according to the culpability of the respective parties, and diminished in proportion to the negligence of the plaintiff. These seem to be the ruling

<sup>1</sup>Chicago & Rock Island R. R. Co. v. Still, 19 Ill. 499; Galena & Chi. Union R. R. Co. v. Jacobs, 20 Ill. 478; Chicago, B. & Q. R. R. Co. v. Dewey, 26 Ill. 255; Chicago, B. & Q. R. R. Co. v. Hazzard, 26 Ill. 373; Chicago, B. & Q. R. R. Co. v. Payne, adm'r., 49 Ill. 499; Indianapolis & St. Louis R. R. Co. v. Galbreath, 63 Ill. 436, 7 Am. Ry. Rep. 128; Indianapolis, Bloomington & Western R. R. Co. v. Flanigan, 77 Ill. 365; Toledo, Wabash & Western Ry. Co. v. O'Connor, *Id.* 391; St. Louis, Vandalia & Terre Haute R. R. Co. v. Dunn, 78 Ill. 197; Sterling Bridge Co. v. Pearl, 80 Ill. 251; Rockford, Rock Island & St. Louis R. R. Co. v. Delaney, 82 Ill. 198; Schmidt v. C. & N. W. Ry. Co., 83 Ill. 405; Ill. Cent. R. R. Co. v. Hetherington, 83 Ill. 510; Same v. Hammer, 85 Ill. 526; Joliet v. Seward, 86 Ill. 402; Chicago, Burlington & Quincy R. R. Co. v. Lee, 87 Ill. 454,

18 Am. Ry. Rep. 378; Chicago, Burlington & Quincy R. R. Co. v. Harwood, 90 Ill. 425; Wabash R. R. Co. v. Henks, 91 Ill. 406; East St. Louis P. & P. Co. v. Hightower, 92 Ill. 139; Ohio & Miss. Ry. Co. v. Porter, 92 Ill. 437; Ill. Cent. R. R. Co. v. Patterson, 93 Ill. 290; Stratton v. Central City Horse Ry. Co., 95 Ill. 25; S. C. 1 Am. & Eng. R. R. Cas. 115; Lake Shore & Mich. Southern Ry. Co. v. Sunderland, 2 Bradw. (Ill.), 307; Same v. Berlink, *Id.* 427; Chicago & Alton R. R. Co. v. Langley, *Id.* 505; Chicago City Ry. Co. v. Lewis, 5 Bradw. 242; Winchester v. Case, *Id.* 486; Wabash Ry. Co. v. Jones, *Id.* 607. See, as to instructions on comparative and contributive negligence, Stratton v. C. C. H. Ry. Co., *supra*.

<sup>2</sup>C., B. & Q. R. R. Co. v. Payne, adm'r., 49 Ill. 499, 503.

<sup>3</sup>C., B. & Q. R. R. Co. v. Payne, adm'r., 49 Ill. 499, 504.

principles in Georgia, as laid down in the following decisions.<sup>1</sup> The statute of that state of 1847, making railroad corporations liable for injuries committed in running trains, is held to be but in affirmance of the common law, and therefore liability arises only from negligence.<sup>2</sup>

Where the doctrine of comparative negligence prevails, running its cars at the rate of ten miles an hour by a railroad company, in a crowded crossing of a city, is being guilty of such extreme negligence as renders it liable for injury occasioned by running against one who is standing on the crossing watching an opportunity to pass, although the injured person is himself guilty of negligence which is slight in comparison with that of the railroad company.<sup>3</sup>

Railroad companies are held to a very high degree of care in operating their roads through the public streets of cities. They may not omit any reasonable duty that may conduce to the safety of the public, for the public have an equal right to a free use of such thoroughfares.<sup>4</sup> But such companies are not liable for injuries by inevitable accident; for if there is no negligence or willful misconduct on the part of the company, then, no matter how serious the injury, or how incapable of care the injured person is, there is no liability.<sup>5</sup> Thus where a boy seven years old was injured whilst climbing the ladder of a moving freight car, when the same was running no faster than at a legal rate, and those in charge of the train were all in their proper places, observing due care, and no negligence whatever was attributable to the company, as conducing to the injury, it was held that the company were in no degree liable for the injury.<sup>6</sup>

<sup>1</sup> *Macon & Western R. R. Co. v. Davis*, adm'r, 13 Geo. 68; *Same v. same*, 18 Geo. 679; *Central R. R. & B. Co. v. Davis*, 19 Geo. 437; *Macon & Western R. R. Co. v. Winn*, 19 Geo. 440; *Augusta & Savannah R. R. Co. v. McElmurry*, 24 Geo. 75; *Macon & Western R. R. Co. v. Davis*, 27 Geo. 113; *Sims v. Macon & Western R. R. Co.*, 28 Geo. 93; *Yonge v. Kinney*, 28 Geo. 111; *Macon & Western R. R. Co. v. Johnson*, 38 Geo. 409; *Atlanta & Richmond Air Line Ry. Co. v. Ayers*, 53 Geo. 12.

<sup>2</sup> *Macon & Western R. R. Co. v. Davis*, adm'r, 13 Geo. 68; *Same v. same*, 18 Geo. 679.

<sup>3</sup> *Pittsburgh, Cin. & St. Louis Ry. Co. v. Knutson*, 69 Ill. 103; *Lake Shore & Mich. Southern Ry. Co. v. Berlink*, 2 Bradw. (Ill.), 427.

<sup>4</sup> *Chi., Bur. & Q. R. R. Co. v. Stumps*, 69 Ill. 409.

<sup>5</sup> *Chi., Bur. & Q. R. R. Co. v. Stumps*, 69 Ill. 409.

<sup>6</sup> *Chi., Bur. & Q. R. R. Co. v. Stumps*, *supra*.

But although railroad trains and travelers, as hereinbefore stated, have equal rights to public crossings and streets, yet, as an ordinary vehicle is more easily controlled than is a train of cars and locomotive, it behooves those traveling in ordinary vehicles to check up and wait for approaching trains to pass; and so of foot passengers; and all parties are bound to reasonable care to avoid collision.<sup>1</sup> The rule is, where comparative negligence prevails, that negligence of the plaintiff which contributes to the injury will not prevent a recovery when it is slight as compared with the negligence of the defendants; or, in other words, to enable plaintiff to recover where there is negligence on both sides, then when the negligence is compared it must appear that the negligence of the defendant is gross, and that of the plaintiff is but slight.<sup>2</sup> But if the parties are equally guilty of negligence, no action will lie; so if the plaintiff was negligent and defendant not, or plaintiff is grossly negligent—in these cases no action lies, unless there is willful misconduct of defendant.<sup>3</sup>

The original rule of law in the courts of Illinois, in regard to injuries produced by negligence, was that of contributive negligence; that to enable the plaintiff to recover for loss or damages occasioned by the negligence of another, he must not only prove the negligence of the defendant, but must also show that his own negligence or misconduct did not concur with that of defendant in producing the injury.<sup>4</sup>

In *Galena & Chicago Union Railroad Company v. Fay*, 16 Illinois, 558, the Supreme Court of Illinois, SCATES, C. J., p. 570, lays down the rule of contributive negligence, as then (1855) the rule of decision in that state, in the following terms: "It is enough in law to constitute a defense, that the negligence and carelessness caused or contributed to the injury complained of. Where these are shown, courts and juries can not adjust their

<sup>1</sup> Ill. Cent. R. R. Co. v. Benton, 69 Ill. 174.

<sup>2</sup> Toledo, Wabash & Western Ry. Co. v. Spencer, 66 Ill. 528; Ill. Cent. R. R. Co. v. Maffit, 67 Ill. 431; Rockford, Rock Isld. & St. Louis R. R. Co. v. Coultas, 67 Ill. 398; Chi., Bur. & Q. R. R. Co. v. Lee, admr., 68 Ill. 576; Ill. Cent. R. R. Co. v. Benton, 69 Ill. 174, 179; Indianapolis & St. Louis

R. R. Co. v. Evans, 88 Ill. 63, 21 Am. Ry. Rep. 284.

<sup>3</sup> C., B. & Q. R. R. Co. v. Lee, admr., 68 Ill. 576; Ind. & St. L. R. R. Co. v. Evans, *supra*.

<sup>4</sup> Aurora Branch R. R. Co. v. Grimes, 13 Ill. 585; Dyer v. Talcott, 16 Ill. 300; Galena & Chi. Union R. R. Co. v. Fay, 16 Ill. 558; Ill. Cent. R. R. Co. v. Buckner, 28 Ill. 299.

degrees and gauge their effects, nor will the law hold carriers to answer for all the lower degrees, until they amount to *rashness* and *recklessness*. This would add to the highest degree of care, imposed by law upon carriers, an additional responsibility for the negligence and carelessness of passengers short of gross negligence. But such is not the law, and we can not sanction instructions so stating it; nor shall we here undertake to say how slight a degree will destroy the right of reparation.”<sup>1</sup>

And again, in the same case: “Carriers of passengers are not insurers of life, limb, or against loss, damage or injury, as carriers of goods are, except for acts of Providence or the public enemy; but they are required to use the highest degree of care, diligence, vigilance and skill in the selection of materials, construction of their vehicles, and other means of transportation, and for their conduct and management, repairs and preservation of them, with a view to the comfort, safety and transportation of passengers and their baggage; and they are liable for slight neglect or carelessness in any of these particulars, qualified, however, by the reciprocal duty of the passenger, that his want of ordinary care does not cause or contribute to produce the injury.”<sup>2</sup> This ruling was modified or changed in the case of *Galena & Chi. Union R. R. Co. v. Jacobs*, 20 Ill. 478, wherein the doctrine of comparative negligence was declared and adopted, and reiterated in *Chicago, B. & Q. R. R. Co. v. Dewey*, 26 Ill. 255; *C. B. & Q. R. R. Co. v. Hazzard*, 26 Ill. 373; which establish, as shown by Judge BREESE in *Chi. & Alton R. R. Co. v. Gretzner*, 46 Ill. 74, the doctrine of comparative negligence, as above stated; and which, we may here add, has, with slight variations more verbal than otherwise, been adhered to ever since.<sup>3</sup>

As to what degree of care the plaintiff must show himself to have taken, that may, in Illinois, depend upon the relative rights or position of the parties in reference to the rights exercised or position enjoyed by the plaintiff at the time of the injury complained of.<sup>4</sup> Where each is equally in the position of right, held indepen-

<sup>1</sup> *Galena & Chicago Union R. R. Co. v. Fay*, 16 Ill. 570.

<sup>2</sup> 16 Ill. 471.

<sup>3</sup> *Chicago, B. & Q. R. R. Co. v. Van Patten and others*, 64 Ill. 510.

<sup>4</sup> *Aurora Branch R. R. Co. v. Grimes*,

13 Ill. 585, 588; *Chicago, Burlington & Quincy R. R. Co. v. Dewey*, adm'r, 26 Ill. 255, 258; *St. Louis, Alton & Terre Haute R. R. Co. v. Todd*, 36 Ill. 409; *Chi. & N. W. Ry. Co. v. Sweeney*, 52 Ill. 325.



dent of the favor of the other, the plaintiff is only bound to show that the injury resulted from the negligence of the defendant, and that he, the plaintiff, used ordinary diligence to avoid it—that is, he used reasonable care.<sup>1</sup> But though there is a want of such care on the part of the plaintiff, yet he may recover, by the rule laid down in Illinois, if such want of care or other conduct of plaintiff does not contribute to produce the injury.<sup>2</sup>

But where the position of right is not equal, as where the plaintiff, himself pursuing the wrong side of the road, meets with an injury from another traveler, in order to recover, he must show the use of more than ordinary care and diligence on his part to avoid it.<sup>3</sup> So, in Illinois, if the plaintiff come to an injury while in the enjoyment of a privilege or favor, as where, by permission, he is passing through defendant's enclosure, and is there injured by the negligence of the defendant, he is bound to show, to enable him to recover, that he used extraordinary care to avoid the injury, else he can not recover.<sup>4</sup>

If both use ordinary care where ordinary care is all that is demanded, or if both use all the care required of them, respectively, in their respective situations, or if both be equally to blame, then there can be no recovery;<sup>5</sup> and so, also, if the plaintiff alone is in fault.<sup>6</sup> Such is the rule in Illinois; and although the defendant be guilty of some negligence, and such negligence contributes to bring about the injury, yet if the plaintiff him-

<sup>1</sup> *Butterfield v. Forrester*, 11 East, 60; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Chicago, Burlington & Quincy R. R. Co. v. Dewey*, adm'r, 26 Ill. 255, 258; *Chicago & Alton R. R. Co. v. Hogarth*, 38 Ill. 370.

<sup>2</sup> *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585, 588; *Chicago, Burlington & Quincy R. R. Co. v. Dewey*, 26 Ill. 255, 258, 259.

<sup>3</sup> *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585, 591.

<sup>4</sup> *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585, 591; *Ill. Cent. R. R. Co. v. Godfrey*, 71 Ill. 500.

<sup>5</sup> *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585, 591; *Chicago, B. & Q. R. R. Co. v. George*, 19 Ill. 510; *Chicago,*

*Burlington & Quincy R. R. Co. v. Dewey*, adm'r, 26 Ill. 255, 258; *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497, 499; *Toledo, Peoria & Warsaw R. W. Co. v. Riley*, 47 Ill. 514; *Ill. Cent. R. R. Co. v. Slatton*, 54 Ill. 133; *Ill. Cent. R. R. Co. v. Baches*, 55 Ill. 379; *Chi. & Alton R. R. Co. v. Murray*, 62 Ill. 326; *Chicago, B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510.

<sup>6</sup> *Chicago & Alton R. R. Co. v. McLaughlin*, 47 Ill. 265. And it is not the duty of the company to put guards over cars standing idle on the track, to prevent children intruding on and being injured by the same: *Id.*; *Chicago, Burlington & Quincy R. R. Co. v. Stumps*, 63 Ill. 409.

self is shown to have been greatly more negligent, or, in the language of some jurists, guilty of gross negligence, and such negligence of the plaintiff contributed to bring about the injury, then plaintiff can not recover.<sup>1</sup>

The case of *St. Louis, Alton & Terre Haute Railroad Company v. Todd*, above cited, was reversed by the Supreme Court of Illinois, WALKER, C. J., because of the refusal of the court below to give the following instruction: "If negligence on the part of the plaintiff has been proved in this suit, then the railroad company is only liable for gross negligence, which implies willful injury." The court then say: "Some of the adjudged cases go to the length of holding, that whenever the plaintiff has, by his negligence, contributed to the injury complained of, he has no right to a recovery. But the rule of this court is, that negligence is relative, and that a plaintiff, although guilty of negligence which may have contributed to the injury, may hold the defendant liable, if he has been guilty of a higher degree of negligence, amounting to willful injury. The fact that a plaintiff is guilty of slight negligence, does not absolve the defendant from the use of care and all reasonable efforts to avoid the injury. The negligence of the plaintiff does not license the defendant to wantonly or willfully destroy plaintiff's property. Each party must be held to the use of all reasonable efforts to avoid the injury, and the negligence of one party does not absolve the other from diligence and caution."<sup>2</sup>

So, on the other hand, although the plaintiff be guilty of slight negligence which may have contributed to the bringing about of the injury, yet if the defendant be guilty of gross neg-

<sup>1</sup> *Chicago, Burlington & Quincy R. R. Co. v. Dewey*, adm'r, 26 Ill. 255, 258, 259; *St. Louis, Alton & Terre Haute R. R. Co. v. Todd*, 36 Ill. 409, 414; *Great Western R. R. Co. v. Harworth and others*, 39 Ill. 346; *Chicago & Rock Isld. R. R. Co. v. McKean*, 40 Ill. 218; *Quinn, adm'r, v. Ill. Cent. R. R. Co.*, 51 Ill. 495; *Chi. & N. W. R. W. Co. v. Sweeney*, 52 Ill. 325; *Chicago, B. & Q. R. R. Co. v. Lee*, 60 Ill. 501; *Indianapolis & St. Louis R. R. Co. v. Galbreath*, 63 Ill. 436, 7 Am. Ry. Rep.

128; *Foster v. Chicago & Alton R. R. Co.*, 84 Ill. 164, 16 Am. Ry. Rep. 452. In the last cited case the plaintiff was a switchman, who received an injury while coupling cars from the inside of a short curve, by catching his foot between the main rail and a guard, of which he had knowledge; and the court refused, inasmuch as he could not recover under the facts, to reverse the judgment for erroneous instructions.

<sup>2</sup> 36 Ill. 414, 415.

ligence which likewise contributes to the cause of the injury, then, by the rule of negligence as established in the courts of Illinois, the plaintiff can recover.<sup>1</sup> And though plaintiff or his property may be in some respect out of place—as, for instance, if his stock is unauthorizedly upon the track of a railroad—yet it is the duty of the company to avoid injury of it, if it can be done by ordinary care, and without injury to the company or the public.<sup>2</sup>

In the case of *The Chicago, Burlington & Quincy Railroad Company v. Van Patten*, 64 Illinois, 510, decided in 1872, the Supreme Court of Illinois, pages 516, 517, Scott, J., say:

“The doctrine of comparative negligence of the parties has been recognized in this state certainly since the decision of the case of the *Galena & Chicago Union R. R. Co. v. Jacobs*, 20 Ill. 478. The rule adopted in some of the earlier cases in this court, that the party injured should be without fault, was modified by that decision. But the law is well settled, and the rule has not been departed from, that where the party injured is alone in fault, and the injuries the result of his own negligence, he can not recover: *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *Dyer v. Talcott*, 16 Ill. 300; *G. & C. U. R. R. Co. v. Fay*, 16 Ill. 558.

If both parties are equally in fault, or nearly so, the rule is the same.

<sup>1</sup> *St. Louis, Alton & Terre Haute R. R. Co. v. Todd*, 36 Ill. 409; *Chicago & Alton R. R. Co. v. Hogarth*, 38 Ill. 370; *Chicago, Burlington & Quincy R. R. Co. v. Triplett*, 38 Ill. 482; *Chicago, B. & Q. R. R. Co. v. Cauffman*, 38 Ill. 424; *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497, 499; *Pittsburg, Fort Wayne & Chi. Ry. Co. v. Bumstead*, 48 Ill. 221; *Chi. & N. W. Ry. Co. v. Barrie*, 55 Ill. 226; *Chi., Burlington & Quincy R. R. Co. v. Dunn*, 61 Ill. 385; *Indianapolis & St. Louis R. R. Co. v. Stables*, 62 Ill. 313; *Chi. & Alton R. R. Co. v. Murray*, 62 Ill. 326; *Indianapolis & St. Louis R. R. Co. v. Galbreath*, *supra*; *Chicago, B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510. And the terms *considerable* and

*little* have been in one case tolerated as comparative of the degrees of negligence of the parties, and is approved: *Ill. Cent. R. R. Co. v. Shultz*, 64 Ill. 172.

<sup>2</sup> *Ill. Cent. R. R. Co. v. Baker*, 47 Ill. 295; *Pittsburg, Fort Wayne & Chi. Ry. Co. v. Bumstead*, 48 Ill. 221; *Chi., Burlington & Quincy R. R. Co. v. Payne, adm'r*, 49 Ill. 499; *Chi., Bur. & Quincy R. R. Co. v. Dunn*, 52 Ill. 451; *Chi. & N. W. Ry. Co. v. Harris*, 54 Ill. 528; *Chi., Rock Isld. & Pacific R. R. Co. v. Dignan*, 56 Ill. 487; *Chi., Bur. & Quincy R. R. Co. v. Gregory*, 58 Ill. 272; *C., B. & Q. R. R. Co. v. Payne, adm'r of Payne*, 59 Ill. 534.

The cases in this court that establish the doctrine of comparative negligence, hold that there must be negligence on the part of the defendant, and no want of ordinary care on the part of the plaintiff; and where there has been negligence in both parties, still the plaintiff may recover, where his negligence is slight, and that of the defendant is gross, in comparison with that of the plaintiff. This rule has been extended to include cases where the negligence of the plaintiff has contributed, in some degree, to the injury complained of. It is upon the principle that, although a party may have himself been guilty of negligence, it does not authorize another to recklessly and wantonly destroy his property, or commit a personal injury. *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 75, and cases cited."

4. **Legal negligence.**—When there is no conflict of evidence or disputed fact for a jury to decide, the question of negligence then becomes a matter of law to be decided by the court; and this, too, although it involves the entire right of action in the case;<sup>1</sup> and so if there be no evidence of negligence, nor of any facts or circumstances from which it may be fairly inferred,

<sup>1</sup> *Newkirk v. New York & Harlem R. R. Co.*, 38 N. Y. (11 Tiffany), 158; *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468, 473; *Penn. R. R. Co. v. Ogier*, 11 Casey (35 Penn. St.), 71; *North Penn. R. R. Co. v. Heileman*, 49 Penn. St. 60; *Catawissa R. R. Co. v. Armstrong*, 2 P. F. Smith, 52 Penn. St., 286; *Pittsburgh, Fort Wayne & Chi. R. R. Co. v. Evans*, 53 Penn. St. 250; *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294; *Glassey v. The Hestonville, Mantua & F. P. Ry. Co.*, 57 Penn. St. 172; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *Pittsburg, Allegh. & Manchester R. W. Co. v. Pearson and wife*, 72 Penn. St. 169; *McKee v. Bidwell*, 74 Penn. St. 218; *Grows v. Maine Cent. R. R. Co.*, 67 Me. 100, 16 Am. Ry. Rep. 326; *Maher v. Atlantic & Pacific R. R. Co.*, 64 Mo. 267, 17 Am. Ry. Rep. 231; *Fletcher v. Same*, *Ib.* 481, 17 Am. Ry. Rep. 303; *Union*

*Pacific R. W. Co. v. Rollins*, 5 Kansas, 177; *Lane and others v. Old Colony & Fall River R. R. Co.*, 14 Gray, 143; *Gavett v. Manchester & Lawrence R. R. Co.*, 16 Gray (Mass.), 501; *Langhoff, admr., v. Mil. & Prairie du Chien Ry. Co.*, 23 Wis. 43; *Same v. Same*, 19 Wis. 489; *Grand Trunk R. W. Co. v. Nichol*, 18 Mich. (5 Jennison), 171; *Lake Shore & Mich. S. R. R. Co. v. Miller*, 25 Mich. (3 Post), 274; *Kelly, admr., v. Hendrie*, 26 Mich. (4 Post), 255; *Lewis v. The Balt. & O. R. R. Co.*, 38 Md. 588; *McMahon v. N. Cent. Ry. Co.*, 39 Md. 438; *Flemming v. Western Pacific R. R. Co.*, 49 Cal. 253, 7 Am. Ry. Rep. 265; *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45; *S. C.* 20 Am. Ry. Rep. 101, 9 *Id.* 352; *Directors, etc., of Metropolitan Ry. Co. v. Jackson*, Law Rep., 3 App. Cas., 193, 15 Am. Ry. Rep. 621.

then the court, and not the jury, are to decide.<sup>1</sup> And when such question is decided in a court of last resort, on such a point as shows there was no cause of action in law, and as leaves nothing for retrial in the court below, the court may not only reverse the judgment of the lower court, as the occasion may require, if against the defendant, but may dispose of the case by a final and absolute judgment in his favor, *non obstante veredicto*.<sup>2</sup>

Recklessly attempting to pass over the railroad, in view of and before two closely approaching trains, is negligence, and will be so held by the court.<sup>3</sup> And so it is for the company to cut a train in two, and run a portion thereof through the public streets with no one on it to look out, and no flagman at the crossings.<sup>4</sup> It is legal negligence, and should be so ruled by the court, for one to attempt to pass across or under a moving train;<sup>5</sup> and so of an attempt to cross the platform of a car of a standing train;<sup>6</sup> and for a boy to be sitting on a trestle-work,

<sup>1</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294; *Penn. R. R. Co. v. Barnett*, 59 Penn. St. 259, 263; *Maher v. Atlantic & Pacific R. R. Co.*, 64 Mo. 267, 17 Am. Ry. Rep. 231; *State, for use, etc., v. Phila., Wilm. & Balt. R. R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253; *Steffen v. Chicago & N. W. Ry. Co.*, 46 Wis. 259, 21 Am. Ry. Rep. 385; *Daniel v. Metropolitan Ry. Co.*, L. R. 5 H. L. 45; *S. C.*, L. R. 3 C. P. 216, 591; *Welfare v. London & B. Ry. Co.*, L. R. 4 Q. B. 693; *Lewis v. London, C. & D. Ry. Co.*, L. R. 9 Q. B. 66; *Stubley v. London & N. W. Ry. Co.*, L. R. 1 Exch. 13; *Dublin, W. & W. Ry. Co. v. Slattery*, L. R. 3 App. Cas. 1155; *Slattery v. Dublin, W. & W. Ry. Co.*, Irish Rep. 8 C. L. 531, and 10 *Id.* 256.

<sup>2</sup> *Harty v. Cent. R. R. Co. of N. Jersey*, 42 N. Y. 468, 473, 481, 482.

<sup>3</sup> *Langhoff, admr., v. Mil. & Prairie du Chien Ry. Co.*, 19 Wis. 489; *Same v. Same*, 23 Wis. 43; *Gerety v. Phila., Wilm. & Balt. R. R. Co.*, 81

*Penn. St.* 274, 16 Am. Ry. Rep. 164; *Grows v. Maine Cent. R. R. Co.*, *supra*; *Brown v. Milwaukee & St. Paul Ry. Co.*, 22 Minn. 165, 19 Am. Ry. Rep. 298.

<sup>4</sup> *Butler, admx., v. Mil. & St. Paul Ry. Co.*, 28 Wis. 487; *Brown v. N. Y. Cent. R. R. Co.*, 32 N. Y. 597; *French v. Taunton Branch R. R. Co.*, 116 Mass. 537; *Ills. Cent. R. R. Co. v. Baches*, 55 Ill. 379; *Chi. & N. W. Ry. Co. v. Taylor*, 69 Ill. 461. See *Jeffrey v. Keokuk & Des Moines R. R. Co.*, 51 Ia. 439.

<sup>5</sup> *McMahon v. N. Cent. Ry. Co.*, 39 Md. 438. And so to attempt to get on a train while in motion: *Harvey v. Eastern R. R. Co.*, 116 Mass. 269, 7 Am. Ry. Rep. 463.

<sup>6</sup> *Lewis v. The Balt. & O. R. R. Co.*, 38 Md. 588; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438; *Memphis & Charleston R. R. Co. v. Copeland*, 61 Ala. 376; *Stillson v. Hannibal & St. Jos. R. R. Co.*, 67 Mo. 671.

under one of a train of freight cars, whereby he is run over and killed.<sup>1</sup>

But there may be cases in which there is no conflict or doubt as to the facts, but yet such a necessity of drawing inferences, or conclusions of fact, from the facts proven, as nevertheless render it proper to submit the matter to the determination of a jury.<sup>2</sup> And if there is but slight evidence of negligence to charge the defendant, it should go to the jury.<sup>3</sup> But where the material facts, when found, admit of no rational inference but that of negligence, then the question of negligence becomes a matter of law merely.<sup>4</sup>

It is held by some writers that it is not negligence to place one's self in a condition or place where injury may come, and yet can only come by the negligence of another; that is, that one may suppose, and act upon that supposition, that others will conform to the relative duties of life, and must do so at their peril, whilst he need only rely for his own safety upon such conformity and care of others, taking no care himself as to injury possible to result to him from the want in others of such care and conformity; and the following authorities, with others, are relied on in support of these principles.<sup>5</sup> So far as these and

<sup>1</sup> *Ostertag v. Pacific R. R. Co.*, 64 Mo. 421, 17 Am. Ry. Rep. 257.

<sup>2</sup> *McKee v. Bidwell*, 74 Penn. St. 218; *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45; S. C. 9 Am. Ry. Rep. 352, 20 *Id.* 101; *Hackford v. N. Y. Cent. & H. R. R. Co.*, 53 N. Y. 654; S. C. 43 How. Pr. 222; *Belton v. Baxter*, 58 N. Y. 411; S. C. 54 N. Y. 245; *Massoth v. Del. & Hudson Canal Co.*, 64 N. Y. 524; *Phila. & Reading R. R. Co. v. Killips*, 88 Penn. St. 405; *Balt. & Ohio R. R. Co. v. Whitacre*, 35 Ohio St. 627; *Same v. Whittaker*, 24 *Id.* 642; *Carrington v. Ficklin*, 32 Gratt. 670; *Hawker v. Balt. & Ohio R. R. Co.*, 15 W. Va. 628; *Solen v. Va. & Truckee R. Co.*, 13 Nev. 145; *Kans. Pac. Ry. Co. v. Twombly*, 3 Col. 125.

<sup>3</sup> *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168; *Cook v. Hannibal & St. Joseph R. R. Co.*, 63 Mo. 397, 20 Am. Ry.

Rep. 177; *Craig v. N. Y., N. H. & H. R. R. Co.*, 118 Mass. 431.

<sup>4</sup> *Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172; *Marietta & Cin. R. R. Co. v. Picksley*, *Id.* 654; *Penn. Ry. Co. v. Rathgeb*, 32 *Id.* 66; *Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657; *Lewis v. Balt. & Ohio R. R. Co.*, 38 Md. 588; *Goldstein v. Chi., Milw. & St. P. Ry. Co.*, 46 Wis. 404.

<sup>5</sup> *Newson v. New York Cent. R. R. Co.*, 29 N. Y. 383, 391; *Beisiegel v. New York Cent. R. R. Co.*, 34 N. Y. 622; *Ernst v. The Hudson River R. Co.*, 35 N. Y. 9, 35; *Reeves v. The Delaware, L. & W. R. R. Co.*, 30 Penn. St. 454; *Phila. & Trenton R. R. Co. v. Hagan*, 47 Penn. St. 244; *Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172.

similar decisions may bear out the principle thus asserted, we are constrained to regard them as an innovation upon the true doctrine of the law. But some of them at least are not in point, and therefore, though good enough authority where applicable, do not apply to this question in purely a legal point of view. The case of *Newson v. The New York Cent. R. R. Co.* turned upon an implied contract of assurance of the safety of the injured party on the part of the railroad company. The facts of that case show that the injured party was unloading gravel from one of its cars into his wagon at a place on the company's track where he was directed by the company so to do, and at that particular time, and was there run into by an engine of the company whilst so engaged. The court held that it was impliedly to be understood that he would not be in any such manner endangered whilst performing that duty, and that he had a right so to presume, and to rely on that presumption for safety, he being placed there by the company itself. So it is not a case in point with the question in hand. The one rests on the ordinary legal duty, the other rests on a duty implied, as growing out of a special contract or undertaking between the parties; so that the language of that decision, that "the law will never hold it imprudent in any one to act upon the presumption that another, in his conduct, will act in accordance with the rights and duties of both," is to be taken and applied in a limited sense, as in reference to that particular case, and not as applicable generally to questions of mere relative rights and duties existing in law. To have been thus engaged on the track of the company of his own mere act and will, would undoubtedly have amounted to legal negligence; but to be there, and so engaged, by the direction of the company, would not amount to negligence of any kind, or at all; for he was impliedly under its protection and care for the time being, and had a right to so presume, as the company had full control over its engines and the track.

In *Reeves v. The Del., L. & W. R. R. Co.*, 30 Penn. St. 454, another one of the cases relied on for this doctrine of immunity, the question of negligence was referred to the jury for their decision under all the circumstances.

To our mind, this doctrine of immunity entirely ignores the principles of the law as heretofore administered in relation to contributory negligence, except in cases where the conduct of

the injured party may be such as to necessarily result in his injury, although the other party not only conform to the law, but do so in such a manner as not to be guilty of any negligence or want of care at all. It even goes further than the mild doctrine of comparative negligence; it assumes immunity for one party, and makes the other responsible for the negligence of both, and that, too, even though the injured party be the more negligent of the two. It does not even measure or weigh the relative culpability of the parties, but allows the plaintiff to recover on the allegation, if true, that he would not have been injured if defendant had not been negligent, notwithstanding the gross negligence of himself. True, I slept upon your track, but would have awoken and got out of the way before the train arrived, if you had not altered your time card, or had not run faster than the time thereby, or by law, allowed; or I walked on it, or alongside of it, near enough to be struck; or ventured upon a highly elevated bridge, and was there struck by your train, but would not have been but for your accelerated speed. If the injured party may rely on, and act on, the supposition of care and legal compliance of the other party in one case, he may do so in all cases, for the operation of legal principles must be uniform, and thus there will be no obstacle to his recovery for an injury in any case, except where he wantonly subjects himself thereto.

In *Maginnis v. The New York Central & Hudson River Railroad Company*, the New York Court of Appeals entirely ignored this doctrine, in effect, and held that going upon a railroad track with knowledge that a train is approaching thereon, but under the supposition that the rate of speed with which it is running will not be increased, and that therefore crossing can be effected with safety, is negligence, and that a party thus venturing can not recover if injured thereon, although the company itself be guilty of negligence in running the train backward in the night time, without any light or signal, or other warning, and although it be in the street where teams are accustomed to pass, and the speed of such backing train be suddenly accelerated after the train has so nearly stopped that to one in its rear its motion is scarcely perceptible.<sup>1</sup>

<sup>1</sup> *Maginnis, admr., v. New York Cent. & Hudson River R. R. Co.*, 52 N. Y. 215, 223. The question as to whether it is negligence in a flagman



In Indiana, a failure to give signals at railroad crossings of public highways, there being no statute requiring the same, is not negligence *per se*. To make such omission negligence, there must be some difficulty in the way of hearing and seeing an approaching train at a crossing;<sup>1</sup> for it is the duty of a person crossing, or approaching a railroad to cross, to use ordinary care to avoid injury, and for that purpose to avail himself of all the ordinary means within his control, among which are the senses of seeing and hearing. If he fail to do so he must take the consequences.<sup>2</sup> And this rule is general.

The case cited here from 42 New York, of *Harty v. The Central Railroad Company of New Jersey*, was for a personal injury received whilst walking upon the track of the railroad in a public street, and one in which the Court of Appeals assume (in their opinion) that the injured party was lawfully upon the track at the time of the accident; but was not there from any necessity. The court, EARL, Chief Justice, say: "It was not necessary for him to go upon the north track to avoid collision with the eastward bound train. He could have gone between the tracks. Instead of doing this, he needlessly and thoughtlessly went upon the north track with his back toward the coming train. When he was upon the railroad track, he knew he was in a place of danger, and that he might be killed; and hence it was his duty to use his eyes and ears, and to take at least ordinary precautions to save his life. Not having done this, I believe it is now well settled that no damages can be recovered on account of his death." "Judgment affirmed, and judgment absolute for the defendant."<sup>3</sup>

Sleeping upon the track of a railroad is negligence *per se*.<sup>4</sup>

in the employ of the railroad company to be upon the track at the crossing, is one of fact, and should go to the jury: *Sammon v. New York & Harlem R. R. Co.*, 62 N. Y. 251, 12 Am. Ry. Rep. 150. But see *Steele v. Cent. R. R. Co.*, 43 Ia. 109.

<sup>1</sup> *Bellefontaine Ry. Co. v. Hunter's admr.*, 33 Ind. 335. Otherwise, however, when required by statute: *Fletcher v. Atlantic & Pacific R. R. Co.*, 64 Mo. 484, 17 Am. Ry. Rep. 303.

<sup>2</sup> *Bellefontaine Ry. Co. v. Hunter's admr.*, 33 Ind. 335; *North Penn. R. R. v. Heileman*, 49 Penn. St. 60; *Chicago & Alton R. R. Co. v. Gretzner*, 46 Ill. 74; *Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Elliott*, 28 Ohio St. 340, 14 Am. Ry. Rep. 123.

<sup>3</sup> 42 N. Y. 473.

<sup>4</sup> *Richardson v. The Wilmington & Manchester R. R. Co.*, 8 Rich. Law, 120.

If a slave be guilty of such negligence, by sleeping on a railroad track, and be there killed by a train, his negligence in that respect is attributable to his master in a suit by the latter against the company for damages for the loss of the slave; and such negligence being contributory, the master can not recover; and so if the result as to the killing is from the combined negligence of the person killed and the company.<sup>1</sup>

It is not negligence *per se* for a railroad company to permit dry grass and weeds to accumulate upon its right of way. The presence of such there does not create a legal presumption of negligence. That such accumulations may be facts, when proven, from which negligence may be inferred, is true under certain circumstances; but they are not evidence of negligence *per se*.<sup>2</sup> The true rule in reference to the relative duties of railroad companies and landholders, as to such accumulations, is that each is bound to the same degree of care and diligence to avoid injury. If the company provide the best known means of preventing the escape of fire, and the landholder suffers such accumulations on his premises, and is injured by the escape of fire, then although like accumulations on the right of way are permitted by the company, and fire escape, whether on the right of way, or on the field of the owner, "we can not see (say the Supreme Court of Illinois) that the company should be held liable for negligence."<sup>3</sup> In this case the court disregard the ruling in *Bass v. Chicago, Burlington & Quincy R. R. Co.*, 28 Ill. 9, in reference to the duty of railroad companies to prevent the growth of weeds and grass on their right of way grounds.

<sup>1</sup> *Richardson v. The Wilmington & Manchester R. R. Co.*, 8 Rich. L. 120; *Felder v. The Louisville, Cin. & Charleston R. R. Co.*, 2 McMullan (South Car.), 403; *Herring v. The Wilmington & Raleigh R. R. Co.*, 10 Ired. 402. It is thus seen that the rule of contributive negligence obtains in South Carolina; and we may here also add, that so does the common law rule of non-liability of the employer for injuries to an employee from the negligence of a co-employee: *Murray v. South Car. R. R. Co.*, 1 McMullan, 385.

<sup>2</sup> *Ill. Cent. R. R. Co. v. Mills*, 42 Ill.

407; *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497, 500; *Ohio & Miss. Ry. Co. v. Porter*, 92 Ill. 437; *Toledo, Wabash & Western Ry. Co. v. Wand*, 48 Ind. 476; *Pittsburgh, Cin. & St. Louis R. R. Co. v. Nelson*, 51 Ind. 150; *Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176; *Perry v. Same*, *Id.* 578; *Snyder v. P., C. & St. L. Ry. Co.*, 11 W. Va. 14; *Troxler v. Richmond & Danville R. R. Co.*, 74 N. Car. 377; *Smith v. London & S. W. Ry. Co.*, L. R. 6 C. P. 14; *S. C.*, 5 *Id.* 98

<sup>3</sup> *Ohio & Miss. R. R. Co. v. Shanefelt*, 47 Ill. 497, 502; *Ill. Cent. R. R. Co. v. Frazier*, 47 Ill. 505.

It is negligence *per se*, of so gross a character, for a person, while intoxicated, to place himself, about dark, or in the dusk of the evening, on a railroad track in a public street, where trains are passing and repassing, and there remain until run over and killed by a passing train, that no recovery can be had in an action therefor, unless the railroad company's agents or servants willfully run over the deceased and cause his death, or are guilty of negligence in that respect so gross as in law to amount to a willful neglect of duty.<sup>1</sup> And so it is negligence *per se*, and that, too, of so gross a character, for a person to make a foot path of a railroad, and use the same to walk along on, at a place not in or across a public highway, or a place open to the public, that if injured thereon, unless by an act of still grosser negligence on the part of the railroad company, he can not recover.<sup>2</sup> Such is the ruling in Illinois, where the doctrine of comparative negligence prevails; and applied where the rule of contributive negligence is acted on, it will prevent a recovery by plaintiff at all.<sup>3</sup>

It is negligence, and should be so ruled by the court, without any reference to the jury, for a person to attempt to cross a railroad in a vehicle without stopping to look and to listen for trains—if there be no conflict in the evidence as to the fact thereof. Nor does it matter that there are obstacles in the way of seeing along the road; this is only a reason for greater precaution; and therefore it increases the obligation of the traveler, not only to use other necessary means of caution, but to make still greater efforts to see and hear, if any trains are likely to approach, so as

<sup>1</sup> Ill. Cent. R. R. Co. v. Hutchinson, admx., 47 Ill. 408, 410, 413. See also Chicago City Ry. Co. v. Lewis, 5 Bradw. (Ill.), 242; Healy v. City of New York, 3 Hun, 708; Davis v. Oregon & Cal. R. R. Co., 8 Oreg. 172; Cramer v. City of Burlington, 42 Ia. 315; Marquette, Houghton & Ontonagon R. R. Co. v. Handford, 39 Mich. 537; Southwestern R. R. Co. v. Hankerson, 61 Ga. 114. But in such case, if the law has established a general presumption of negligence on the part of the company, the plaintiff should not be non-suited unless the evidence clearly rebuts such presumption:

Hankerson v. South Western R. R. Co., 59 Ga. 593, 18 Am. Ry. Rep. 458.

<sup>2</sup> Illinois Cent. R. R. Co. v. Baches, 55 Ill. 379; Lake Shore & Mich. Southern R. R. Co. v. Hart, 87 Id. 529, 19 Am. Ry. Rep. 249; Cogswell v. Oregon & Cal. R. R. Co., 6 Oreg. 417; O'Donnell v. Mo. Pac. R. R. Co., 7 Mo. App. 190; Lang v. Holiday Creek R. R. Co., 42 Ia. 677; Richmond & D. R. R. Co. v. Anderson, 31 Gratt. 812.

<sup>3</sup> Donaldson v. Milwaukee & St. Paul Ry. Co., 21 Minn. 293, 20 Am. Ry. Rep. 15.

to ascertain with certainty the state of the road as to passing or approaching trains.<sup>1</sup>

In the case of the Pennsylvania Railroad Company *v.* Beale, the Supreme Court of Pennsylvania lay down the law of this subject in the following terms: "Indeed, the duty of stopping is more manifest when an approaching train can not be seen or heard than where it can. If the view of a track is unobstructed, and no train is near or heard approaching, it might, perhaps, be asked, why stop? In such a case there is no danger of collision—none takes place—and the sooner the traveler is across the track the better. But the fact of collision shows the necessity there was of stopping; and therefore in every case of collision the rule must be an unbending one. If the traveler can not see the track by looking out, whether from fog or other cause, he should get out, and if necessary lead his horse and wagon. A prudent and careful man would always do this at such a place. In the Hanover Railroad Company *v.* Coyle, 5 P. F. Smith, 396, the plaintiff, a pedlar, in the depth of winter, was driving inside of his covered wagon, with his head muffled up in a thick overcoat, and it appeared that a traveler passing in the direction he was going could not see up and down the track until within sixteen feet of it. Yet these circumstances were not allowed to form any excuse for his negligence in omitting to stop. There never was a more important principle settled than that the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court."<sup>2</sup> Citing North Penn. R. R. Co. *v.* Heileman, *supra*.

So, likewise, when, without a conflict of testimony in that particular, there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law.<sup>3</sup> And when the standard of duty and care is fixed and defined by law, and is the same under all circumstances,

<sup>1</sup>North Penn. R. R. Co. *v.* Heileman, 49 Penn. St. (13 Wright), 60; Hanover R. R. Co. *v.* Coyle, 55 Penn. St. 396; Penn. R. R. Co. *v.* Beale, 73 Penn. St. 504.

<sup>2</sup>73 Penn. St. 509, 510.

<sup>3</sup>Pittsburg & Connellsville R. R. Co. *v.* McClurg, 56 Penn. St. 294; Glassey

*v.* The Hestonville, M. & F. P. Ry. Co., 57 Penn. St. 172; Penn Canal Co. *v.* Bentley, 66 Penn. St. 30; West Chester & Philadelphia R. R. Co. *v.* McElwee, 67 Penn. St. 311, 315; Fernandes *v.* Sacramento City Ry. Co., 52 Cal. 45, 20 Am. Ry. Rep. 101.

its omission is negligence, and may be so declared by the court.<sup>1</sup>

The turning of a blind animal on to the common by its owner, in near proximity to a railroad, is such an act of negligence as to raise the inference of an intention to have it killed, and will prevent a recovery, if it be killed by the train.<sup>2</sup>

To unconsciously or inattentively suffer one's elbow to slip out of a car window beyond the sill, is negligence in itself, unless such person be under no obligation to care for himself;<sup>3</sup> and so, in leaving the cars, of getting off on the wrong side, in the way of trains, instead of getting off on the platform.<sup>4</sup> In such cases it becomes the duty of the court so to charge it.<sup>5</sup> And so in cases clearly involving negligence, arising from an obvious disregard of duty and safety, it becomes the duty of the court to determine it as a question of law.<sup>6</sup> And so when the inference from the facts, they being undisputed, is necessarily that there is negligence, the court should determine the question of negli-

<sup>1</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294; *Glassey v. The Hestonville, M. & F. P. R. W. Co.*, 57 Penn. St. 172; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *West Chester & Phila. R. R. Co. v. McElwee*, 67 Penn. St. 311, 315; *Texas & Pacific Ry. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319; *Louisville & Nashville R. R. Co. v. Connor*, 9 Heisk. 19, 19 Am. Ry. Rep. 368.

<sup>2</sup> *Knight v. Toledo & Wabash Ry. Co.*, 24 Ind. 402. And so as to leaving a team unhitched in close proximity to the railroad: *Dewille v. Southern Pacific R. R. Co.*, 50 Cal. 383, 12 Am. Ry. Rep. 180; and if the owner runs upon the track to catch them, and is himself injured, he can not recover: *Ibid.* But see *contra*, *Wasmer v. Delaware, Lackawanna & Western R. R. Co.*, 80 N. Y. 212; *S. C.*, 1 Am. & Eng. R. R. Cas. 122, in which it was held that such negli-

gence would not defeat a recovery unless it was proximate.

<sup>3</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294. But see *Miller v. St. Louis R. R. Co.*, 5 Mo. App. 471.

<sup>4</sup> *Penn. R. R. Co. v. Zebe and wife*, 9 Casey (33 Penn. St.), 318; *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294, 297.

<sup>5</sup> *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294, 297; *Penn. R. R. Co. v. Zebe and wife*, 9 Casey (33 Penn. St.), 318.

<sup>6</sup> *Penn. R. R. Co. v. Ogier*, 11 Casey (35 Penn. St.), 71; *Catawissa R. R. Co. v. Armstrong*, 2 P. F. Smith (52 Penn. St.), 282; *Pittsburg & Connellsville R. R. Co. v. McClurg*, 56 Penn. St. 294, 297; *Glassey v. Hestonville, M. & F. P. R. W. Co.*, 57 Penn. St. 172; *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45; *S. C.* 9 Am. Ry. Rep. 352, 20 *Id.* 101.

gence as matter of law.<sup>1</sup> Such, too, is the rule in Massachusetts.<sup>2</sup>

So, for a person to walk along upon the track of a railroad, without exercising ordinary care in looking out for trains, is negligence in law, and if injured, he can not recover unless the injury be wantonly inflicted.<sup>3</sup>

Negligence is not imputable to a railroad company from leaving its cars unguarded in the streets of a city, whereby children tampering with the brakes are injured by the cars running down a grade.<sup>4</sup>

But in Illinois the ruling is to the contrary, under the doctrine of comparative negligence. In a case there where an arm, being partially exposed at the car window, was struck against a freight car, which stood so as to be within a few inches of the passenger car, and was broken, the finding below was for plaintiff, and the supreme court sustained the judgment, upon the principle, as alleged, that the negligence of the plaintiff in exposing his arm was slight as compared with that of the railroad company, which was gross in permitting a freight train to stand so near the passenger train as to produce the injury.<sup>5</sup>

In the case here cited from 51 Illinois, the court, WALKER, J., lay down the oft repeated rule of that state in the following terms: "We suppose it to be a clear and undeniable duty of a railway company to keep its track clear of such obstructions; and a failure to do so is gross negligence. With such objects so nearly in contact with cars running at a high rate of speed, life must necessarily be greatly endangered; and when such negligence as appellee may have been guilty of, is compared with the negligence of permitting a freight train to stand so near the track of a passenger train as to produce the injury which did occur, the former is slight and the latter gross. And it has long been the settled law of this court, in such cases, to compare the

<sup>1</sup>Pittsburg & Connellsville R. R. Co. v. McClurg, 56 Penn. St. 294, 297; Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford, 24 Ohio St. 631, 7 Am. Ry. Rep. 172; Penn. Co. v. Rathgeb, 32 *Id.* 66; Thurber v. Harlem B., M. & F. R. R. Co., 60 N. Y. 331.

<sup>2</sup>Todd v. The Old Colony & Fall River R. R. Co., 3 Allen, 18; S. C., 7

Allen, 207. And so recognized in Pittsburg & Connellsville R. R. Co. v. McClurg, 56 Penn. St. 294, 298.

<sup>3</sup>Carlin v. Chi., Rock Island & Pacific R. R. Co., 37 Iowa, 316.

<sup>4</sup>Central Branch Union Pac. R. R. Co. v. Henigh, 23 Kan. 347.

<sup>5</sup>Chicago & Alton R. R. Co. v. Pondrom, 51 Ill. 333.

negligence of both parties, and even if the plaintiff is guilty of negligence which is slight, as compared with that of the defendant, he may recover: *Galena & Chicago Union R. R. Co. v. Jacobs*, 20 Ill. 478; *Chicago & Rock Island R. R. Co. v. Still*, 19 Ill. 499; *St. Louis & Alton R. R. Co. v. Todd*, 36 Ill. 409; *Chicago & Alton R. R. Co. v. Hogarth*, 38 Ill. 370. These cases, besides a large number of others in our court, announce the rule, and notwithstanding other courts have adopted and acted upon a different rule, we regard it as firmly established in this state."<sup>1</sup>

If the whole evidence of plaintiff has no tendency to show care on his part, but on the contrary shows that he is careless, it is the duty of the court to direct the jury, as matter of law, to return a verdict for the defendant.<sup>2</sup>

Trains are liable to be detained by various causes, over which the company or its servants have no control, and therefore negligence can not be imputed to the company from the fact that a train is behind time.<sup>3</sup> Nor is the erection of an obstruction to the view at a crossing, negligence *per se*; it should be left to the jury to say whether, under the circumstances, it was negligence.<sup>4</sup>

It is negligence, and will be so held by the court, for a train, in arriving at a station, to stop in such a manner as may induce a belief on the part of passengers waiting to go aboard of it that it had stopped for their reception, and then start up again without warning, when passengers acting on such belief are in the act of entering upon the train; and this, too, without regard to the question of necessity for thus stopping, or whether the stop was an actual or only an apparent one.<sup>5</sup> It is the duty of the company, if passengers are not to enter on the cars under

<sup>1</sup> 51 Ill. 340.

<sup>2</sup> *Lucas v. New Bedford & Taunton R. R. Co.*, 6 Gray, 64; *Gahagan v. Boston & Lowell R. R. Co.*, 1 Allen, 187; *Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; *S. C.* 7 Allen, 207; *Wilson and wife v. City of Charlestown*, 8 Allen, 137; *Delaware, Lackawanna & Western R. R. Co. v. Toffey*, 38 N. J. 525, 13 Am. Ry. Rep. 75

<sup>3</sup> *State, use, etc., v. Phil., Wilm. & Balt. R. R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253.

<sup>4</sup> *Central R. R. Co. of N. J. v. Feller*, 84 Penn. St. 226, 18 Am. Ry. Rep. 369.

<sup>5</sup> *Curtis and wife v. Detroit & Mil. R. R. Co.*, 27 Wis. 158. And see *Texas & Pacific Ry. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319.

such circumstances, to have some one in attendance to prevent or warn them from the attempt.<sup>1</sup>

And so it is negligence *per se* to run a fast train of cars with unabated speed through a crowded thoroughfare or city, where many persons are used to passing or congregating; and if, in doing so, a child of tender years, whose parents or guardians have not been guilty of negligence in regard to the care of it, be run over and injured, the railroad company are liable for the injury.<sup>2</sup> And to make a running or flying switch, of a dark night in a public street, where persons are used to be passing, is in itself great negligence, for which a railroad company will be responsible, if injury to others is caused thereby, unless there be something in the conduct of the injured party to avoid a recovery on his part.<sup>3</sup>

So the running of a passenger train of cars off the track is *prima facie* evidence of negligence on the part of the company, either as to the construction and care of the track, or else in the running of the train thereon;<sup>4</sup> and when proven, it shifts the bur-

<sup>1</sup> Curtis and wife v. Detroit & Mil. R. R. Co., 27 Wis. 158.

<sup>2</sup> Chi. & Alton R. R. Co. v. Gregory, 58 Ill. 226; Toledo, Wabash & Western Ry. Co. v. Miller, 76 Ill. 278; Chi. & Alton Ry. Co. v. Engle, 84 Ill. 397; Same v. Becker, *Id.* 483; S. C., 76 Ill. 25. But see Maher v. Atlantic & Pacific R. R. Co., 64 Mo. 267, 17 Am. Ry. Rep. 231, to the effect that no rate of speed is negligence except where it is regulated by law. In case of an injury to a laborer upon the track, the question of proper signals and rate of speed is for the jury: Schultz v. Chicago & Northwestern Ry. Co., 44 Wis. 638, 18 Am. Ry. Rep. 146. And it is held in Alabama that a railroad company is guilty of negligence in moving a train backward within the limits of a town, with no person stationed to keep a lookout, whereby a person walking upon the track in the same direction with the train, is injured: Savannah & Memphis R. R. Co. v. Shearer, 58

Ala. 672, 20 Am. Ry. Rep. 451.

<sup>3</sup> Chi. & Alton R. R. Co. v. Garvy, adm'r, 58 Ill. 83.

<sup>4</sup> Stevens v. European & N. Am. Ry. Co., 66 Me. 74, 19 Am. Ry. Rep. 48; Edgerton v. The New York & Harlem R. R. Co., 39 N. Y. (12 Tiffany), 227, 229; Peoria, Pekin & Jacksonville R. R. Co. v. Reynolds, 88 Ill. 418, 21 Am. Ry. Rep. 324; George v. St. Louis, Iron Mountain & Southern Ry. Co., 34 Ark. 613; S. C., 1 Am. & Eng. R. R. Cas. 294. To allow a break in the embankment of the road to remain open ten hours, without having a person stationed there to warn passing trains, is negligence which nothing can excuse: Hardy v. N. Car. Cent. R. R. Co., 74 N. Car. 734, 13 Am. Ry. Rep. 121. And so of the breaking down or overturning of a train, or the breaking down of a bridge, or wheel, or axle, or by any accident: Baltimore & Ohio R. R. Co. v. Wightman, 29 Gratt. 431, 17 Am. Ry. Rep. 351. And see Kansas Pacific Ry. Co. v. Miller, 2 Col.



den of proof onto the company to show a proper construction and condition of the track, and careful running of the train, or such facts, if any, as will excuse it from liability—as, for instance, by showing that the same resulted from the unauthorized and wrongful act of a third party, for whose conduct the company is not accountable.<sup>1</sup>

The very act of the driver, allowing an infant of years too tender to use reasonable care, to enter on or get off from a railroad street car at the front, or to ride upon the front platform of such car, is negligence, for which, if injury ensue thereby to such infant, the company owning the road will be responsible. If the driver be unable to remedy the evil of thus riding on the platform, the court hold it to be his duty to stop the car and put the child or children off.<sup>2</sup> In Connecticut, in a case of this character, it was held that the conclusion of the court below upon the question of negligence was one of fact, and therefore could not be reviewed by the supreme court.<sup>3</sup>

So it is negligence *per se*, and will be so held by the court, for a person knowingly to approach to, and step onto, a railroad, so muffled up about the head as to prevent his seeing, and without stopping to listen, or making any effort to discover if a train might be approaching, and he thus be run over and killed by a passing train; there being no dispute about the facts of such a case, the plaintiff will be non-suited.<sup>4</sup>

**5. Negligence is not imputable to infants of tender years.**—The same rule that applies to an adult, as to contributory negligence, does not apply to an infant, an idiot, or an insane person, or one deaf, or a person so infirm, from old age or other cause, as to be incapable of ordinary care of himself; provided the condition of such persons be known to those servants or agents of the company in immediate control of the trains or matters by which the injury is inflicted.<sup>5</sup> The very appearance of an infant

442, 20 Am. Ry. Rep. 245. In the latter case, the same rule is applied to the case of a bridge destroyed by a freshet.

<sup>1</sup> *Edgerton v. The New York & Harlem R. R. Co.*, 39 N. Y. 227, 229; *B. & O. R. R. Co. v. Wightman*, *supra*.

<sup>2</sup> *Pitts., Allegh. & Manchester Pass. R. W. Co. v. Caldwell*, 74 Penn. St. 421.

<sup>3</sup> *Brennan v. Fair Haven & Westville R. R. Co.*, 45 Conn. 234, 17 Am. Ry. Rep. 263.

<sup>4</sup> *Rothe, admr., v. The Mil. & St. Paul R. R. Co.*, 21 Wis. 256.

<sup>5</sup> *O'Flaherty v. Union R. W. Co.*, 45 Mo. 70. The care required of the injured party in such cases is that degree only which is commensurate with the capacity of the party: *Ib.*

is information in itself of its *status* and condition, but as to the infirm condition of adults, that may not in all cases be indicated by appearances. The rule as to infants is, that to those of such tender years as render them incapable of discriminating between danger and safety, or of exercising suitable judgment as to the necessity of care, under the circumstances surrounding the particular case involved, negligence is not imputable; they can not be charged therewith. The relative obligations and duties in that respect devolving on adults, and on persons, though still in their minority, but nevertheless of riper years and of proper age of discretion, do not rest upon infants of years too tender to exercise reasonable care toward themselves.<sup>1</sup>

But whether the intruder be an infant or adult, the mere fact that a party may, in a technical point of view, be a trespasser upon the premises of a railroad company, will not dispense with the duty of ordinary care on the part of the company to avoid his injury by negligence.<sup>2</sup> And if the party injured be an infant of tender years, then the necessity of care on its part is, as we have before seen, dispensed with.<sup>3</sup> Nor can the fact of

<sup>1</sup> *Stout v. The Sioux City & Pacific R. R. Co.*, 2 Dillon's C. C. R., 294; *S. C.*, Railroad Co. *v. Stout*, 17 Wall. 657; *Washington & G. Ry. Co. v. Gladmon*, 15 Wall. 401; *Galena & Chicago Union R. R. Co. v. Jacobs*, 20 Ill. 495; *Chi. & Alton R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago & Alton R. R. Co. v. Becker*, 76 Ill. 25; *S. C.* 84 Ill. 483; *Rockford, Rock Island & St. Louis R. R. Co. v. Delaney*, 82 Ill. 198; *Schierhold v. North Beach & Mission R. R. Co.*, 40 Cal. 447; *Schmidt v. Mil. & St. Paul R. R. Co.*, 23 Wis. 186; *Hartfield v. Roper*, 21 Wend. 615; *Mangam v. The Brooklyn R. R. Co.*, 38 N. Y. (11 Tiffany), 455; *Thurber v. Harlem Bridge, Morrisania & Fordham R. R. Co.*, 60 N. Y. 326, 10 Am. Ry. Rep. 126; *McGovern v. New York Central & Hudson River R. R. Co.*, 67 N. Y. 417, 15 Am. Ry. Rep. 119; *Haycroft v. Lake Shore & Mich. Southern Ry. Co.*, 2 Hun, 489, 64 N. Y. 636; *Casey v. N. Y. Cent. & H. R. R. R. Co.*, 6 Abb. N. C. 104, 78 N. Y.

518; *Bellefontaine & Ind. R. R. Co. v. Snyder*, 18 Ohio St. 399; *Mahoney v. Railroad Company*, 6 Philadelphia Reports, 242; *North Pennsylvania R. R. Co. v. Mahoney*, 57 Penn. St. 187; *Kay v. Penna. R. R. Co.*, 65 Penn. St. 269; *Pitts., Allegh. & Manchester Passenger R. W. Co. v. Caldwell*, 74 Penn. St. 421; *Norfolk & Petersburg R. R. Co. v. Ormsby*, 27 Gratt. 455, 17 Am. Ry. Rep. 321; *Donoho v. Vulcan Iron Works*, 7 Mo. App. 447; *Farris v. Cass Ave. & F. G. Ry. Co.*, 8 Mo. App. 588, 589; *S. C.* 1 Am. & Eng. R. R. Cas. 622; *Walters v. Chi., R. I. & Pac. R. R. Co.*, 36 Ia. 458; *S. C.* 41 Ia. 71; *Govt. Str. R. R. Co. v. Hanlon*, 53 Ala. 70.

<sup>2</sup> *Daley v. Norwich & Worcester R. R. Co.*, 26 Conn. 591; *Isabel v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261; *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33.

<sup>3</sup> *Daley v. Norwich & Worcester R. R. Co.*, 26 Conn. 591.

the parent or guardian of such infant suffering it to go out or wander into a place of danger, be attributed to the infant as negligence, in an action by itself against those inflicting an injury.<sup>1</sup>

But the infancy of the injured party does not change the degree of care required of railroad companies in the running and general management of their trains; nor does it enhance the measure of damages to be found by the jury, if there be no evidence of willfulness in inflicting the injury, for the rules of law regulating the rights and duties of persons, natural and artificial, must be uniform; they are not to be varied according to the supposed intellect of natural persons; it would produce an uncertainty in the law, destructive of all principle.<sup>2</sup> And, of course, this ruling is not to be considered as justifying a railroad company in knowingly running over an infant, clearly seen to be such, under the supposition, applicable to adults, that such person will, as the train approaches, step aside from the track, or in any case to knowingly and willfully inflict an injury on an infant where prudence may avoid it. Yet the degree of care to which minors are to be held individually, is only such as is reasonably to be expected of one of such minor's age and intelligence.<sup>3</sup>

<sup>1</sup> *Daley v. Norwich & Worcester R. R. Co.*, 26 Conn. 591; *Bellefontaine & Ind. R. R. Co. v. Snyder*, 18 Ohio St. 399; *Norfolk & Petersburg R. R. Co. v. Ormsby*, 27 Gratt. 455, 17 Am. Ry. Rep. 321; *Govt. Str. R. R. Co. v. Hanlon*, 53 Ala. 70; *Walters v. Chi., R. I. & Pac. R. R. Co.*, 41 Ia. 71.

<sup>2</sup> *Bannon v. Balt. & O. R. R. Co.*, 24 Md. 108. See, also, *Hartfield v. Roper*, 21 Wend. 615, and *Willetts v. Buffalo & Rochester R. R. Co.*, 14 Barb. 585. In these latter cases, it is held that the negligence of the parent or guardian is imputable to the child.

<sup>3</sup> *Balt. & Ohio R. R. Co. v. State*, 70 Md. 47; *Balt. City Pass. R. W. Co. v. McDonnell*, 43 Md. 534; *Reynolds v. New York Central & Hudson River R. R. Co.*, 58 N. Y. 248, 7 Am. Ry. Rep. 6; *Casey v. N. Y. C. & H. R. R. R. Co.*,

6 Abb. N. C. 104; S. C. 8 *Daly*, 220, and 78 N. Y. 518; *Haycroft v. L. S. & M. S. Ry. Co.*, *supra*; *Bryant v. Altenbrand*, 9 N. Y. Wkly. Dig. 475; *Davis v. N. Y., N. H. & H. R. R. Co.*, *Id.* 522; *Harris v. Uebelhoer*, 75 N. Y. 169; *East Saginaw City Ry. Co. v. Bohn*, 27 Mich. 503, 10 Am. Ry. Rep. 309; *McMillan v. B. & M. R. R. Co.*, 46 Ia. 231, 16 Am. Ry. Rep. 239; *Paducah & Memphis R. R. Co. v. Hoehl*, 12 Bush, 41, 18 Am. Ry. Rep. 338; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613; *Haas v. Chicago & N. W. Ry. Co.*, 41 Wis. 44; *Nagle v. Allegheny Valley R. R. Co.*, 88 Penn. St. 35. And see this rule applied to an employe, in *St. Louis & South-eastern Ry. Co. v. Valirius*, 56 Ind. 511, 18 Am. Ry. Rep. 116. In *Reynolds v. N. Y. Cent. & H. R. R. R. Co.*, *supra*, negligence was imputed

Nor will a recovery for injury to a minor be prevented by the negligence of its parents or guardian, if, by the use of ordinary care and prudence on the part of the company, the injury could have been prevented.<sup>1</sup> And the death of a person from the explosion of a boiler will not render the company liable, if there be no omission or negligence, or improper act, of the company or its servants, causing the explosion.<sup>2</sup>

**6. Negligence of parent or guardian.**—Although infants of years too tender to enable them to exercise such discretion as is necessary for their own security against danger, are not ordinarily subject in law to the imputation of negligence directly, as for their own conduct, yet the want of such care in respect to a child, on the part of its parents or guardian, furnishes the same answer and defense to an action by such parent or guardian for an injury to which such want of care has contributed, as it would on the part of an adult person, if injured under like circumstances;<sup>3</sup> but the omission or want of care must, in such cases,

to a child thirteen years of age; and in *P. & M. R. R. Co. v. Hoehl*, *supra*, it is held that a child twelve years of age is bound to take notice of the signals given by approaching trains.

<sup>1</sup> *Northern Cent. Ry. Co. v. State*, 29 Md. 420; *Same v. Same*, 31 Md. 357; *Balt. & Ohio R. R. Co. v. Fitzpatrick*, 35 Md. 44; *Lewis v. Balt. & O. R. R. Co.*, 38 Md. 588; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438; *Frech v. Phila., Wilm. & Balt. R. R. Co.*, 39 Md. 574; *Balt. City Pass. R. W. Co. v. McDonnell*, 43 Md. 534; *Isabel v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261; *East Saginaw City Ry. Co. v. Bohn*, *supra*.

<sup>2</sup> *Hard, adm'r, v. Vermont & Canada R. R. Co.*, 32 Vt. (3 Shaw), 473. Evidence is admissible that the plaintiff, a boy nine years of age, had been seen, before his injury, upon the tracks, and warned not to go there, as showing due care on his part: *Fitzpatrick v. Fitchburg R. R. Co.*, 128 Mass. 13; *S. C. 1 Am. & Eng. R.*

*R. Cas.* 154.

<sup>3</sup> *Hartfield v. Roper & Newell*, 21 Wend. 615; *Morrison v. Erie Ry. Co.*, 56 N. Y. 302, 6 Am. Ry. Rep. 166; *Harris v. Uebelhoer*, 75 N. Y. 169; *Schierhold, Adm'r, v. North Beach and Mission R. R. Co.*, 40 Cal. 447; *Brown v. European & N. American R. W. Co.*, 58 Maine, 384; *Leslie v. Lewiston*, 62 Me. 468; *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Wright v. Malden & Melrose R. R. Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 Allen, 401; *Glassey v. The Hestonville, M. & F. P. Ry. Co.*, 57 Penn. St. 172; *North Penn. R. R. Co. v. Mahoney*, 57 Penn. St. 187; *Pitts., Allegh. & Manchester Ry. Co. v. Pearson and wife*, 72 Penn. St. 169; *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33; *Smith v. Hestonville, M. & F. Pass. Ry. Co.*, 92 Penn. St. 450; *S. C. 37 Leg. Int.* 95, and 10 Cent. Law Jour. 272; *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670, 7 Am. Ry. Rep. 186; *Isabel v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261; *Toledo, Wabash &*

as in others, contribute proximately to the injury.<sup>1</sup> In the case cited from 21st Wendell, the court say, COWEN, Justice: "An infant is not *svi juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." And that "It is a mistake to suppose that because the party injured is incapable of personal discretion, he is, therefore, above the law."<sup>2</sup> In the same case it is laid down as the law, that to allow small children to resort to a common highway alone is criminal neglect, and that for an injury there received no action will lie, unless inflicted intentionally, or by culpable negligence.<sup>3</sup>

But although less care is required in law of a child, as to its own safety, than of a person of mature age,<sup>4</sup> it does not follow therefrom that children are, in all cases of personal injury, absolved from the consequences of personal negligence on their part. The care and prudence expected in law from a child has relation to its age, physical strength and intellectual capacity.<sup>5</sup>

Western Ry. Co. v. Grable, 88 Ill. 441, 21 Am. Ry. Rep. 336; Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's adm'r, 27 Ind. 513; Jeffersonville, Madison & Indianapolis R. R. Co. v. Bowen, 40 Ind. 545; S. C. 49 Ind. 154; Evansville & C. R. R. Co. v. Wolf, 59 Ind. 89; Ewen v. Chicago & N.W. Ry. Co., 38 Wis. 613. But not if the infant escape without negligence of the parent, and be injured: 72 Penn. St. 169.

<sup>1</sup>Schierhold, adm'r, v. N. Beach & Mission R. R. Co., 40 Cal. 447. And see the rule of comparative negligence applied in T., W. & W. Ry. Co. v. Grable, *supra*. If the evidence as to whether the parents exercised reasonable care is questionable, the jury should be accurately instructed on the comparison of negligence: *Ibid.*; Stratton v. Central City Horse Ry. Co., 25 Ill. 25; S. C. 1 Am. & Eng. R. R. Cas. 115.

<sup>2</sup>Hartfield v. Roper & Newell, 21

Wend. 615, 619, 620; Pittsburg, A. & M. Ry. Co. v. Pearson, 72 Penn. St. 169; Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Vining's adm'r, 27 Ind. 513; Lafayette & Indianapolis R. R. Co. v. Huffman, 28 Ind. 287; Jeffersonville, M. & I. R. R. Co. v. Bowen, 40 Ind. 545. But it is not negligence *per se* in a parent or guardian to allow an infant twelve years old to go into a different car from such parent to obtain a seat, when none can be had in the car with the mother: Downs v. N. Y. Cent. R. R. Co., 47 N. Y. 86.

<sup>3</sup>Hartfield v. Roper & Newell, 21 Wend. 615; Brown v. European & N. American R. W. Co., 58 Maine, 384; Meeks v. Southern Pacific R. R. Co., 52 Cal. 602, 20 Am. Ry. Rep. 115.

<sup>4</sup>Brown v. The European & N. American R. W. Co., 58 Maine, 384.

<sup>5</sup>Brown v. The European & N. American R. W. Co., 58 Maine, 384; Reynolds v. New York Central & Hud-

The negligence of the parent or guardian, however, is in either case imputable to the injured infant, if not of an age mature enough to take care of itself.<sup>1</sup> If an infant, though of somewhat tender years, is to be treated in law as of suitable age to go alone into a public thoroughfare, so that the allowance thereof will not be imputed to the parent or guardian as negligence, then it follows that such infant is to be held in law to the necessity of observing, and showing the observance of, ordinary care to avoid injury.<sup>2</sup> If, however, he be allowed to frequent such public highway or place of resort when, from his own status as to age and intellectual capacity, he is incapable of using such discretion as may be necessary, under ordinary circumstances, to secure his own safety from injuries arising from want of care, then the permitting him to thus expose himself abroad is negligence in the parent or guardian, and such negligence is attributable to the infant in an action for injuries received by him,<sup>3</sup> and is to be weighed and applied as for what it is worth.

But although it be negligence on the part of the parent or guardian to permit an infant of tender years to go unprotected into a frequented street or highway, this circumstance will not justify those there passing in failing to observe ordinary care toward such infant, as going or being there on its part is not necessarily

son River R. R. Co., 58 N. Y. 248, 7 Am. Ry. Rep. 6; East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503, 10 Am. Ry. Rep. 309; *McMillan v. B. & M. R. R. Co.*, 46 Ia. 231, 16 Am. Ry. Rep. 239; *Paducah & Memphis R. R. Co. v. Hoehl*, 12 Bush, 41, 18 Am. Ry. Rep. 338.

<sup>1</sup>*Brown v. The European & N. American R. W. Co.*, 58 Maine, 384; *Meeks v. So. Pac. R. R. Co.*, *supra*. In the first case the Supreme Judicial Court of Maine say, APPLETON, C. J.: "If a child is of too tender an age to be permitted to go in the streets without the attendance and supervision of those having him in charge, their negligence and want of due care will have the same effect in preventing the maintenance of an action for an injury occasioned by the neglect of another,

as would the plaintiff's want of care, if he were an adult." \* \* \* And "If of age to be permitted to go in the streets without parental or other supervision, he must be held responsible for a degree of care and prudence proportionate to his age": 58 Maine, 388.

<sup>2</sup>*Brown v. The European & N. American R. W. Co.*, 58 Maine, 384, 388.

<sup>3</sup>*Brown v. European & N. American R. W. Co.*, 58 Maine, 384, 388; *Glassey v. The Hestonville, M. & F. P. Ry. Co.*, 57 Penn. St. 172. And so if the parent be present at the time of the accident, controlling the movements of the child, his negligence is imputable to the child: *Stillson v. Hannibal & St. Joseph R. R. Co.*, 67 Mo. 671.

the proximate cause of, or proximately contributory to, the injury, if there run over or trampled upon. Therefore, if there injured by grossly negligent acts of another, then such aggressor will be liable.<sup>1</sup> And what will be but slight or ordinary negligence in reference to an adult, possessing all his ordinary faculties, will amount to aggravated carelessness when indulged in toward the helpless, as an infant, aged or infirm person.<sup>2</sup>

It is held in New York that it is not negligence in law for a parent to allow an eight year old boy to go alone into the streets to his school;<sup>3</sup> but it is negligence to let a child of four years of age run unprotected in the streets of a city traversed by cars and other vehicles.\* Ordinarily, the question of the contributory negligence of the child or its parents should be left to the jury.<sup>5</sup>

Likewise in Louisiana it is held, as matter of law, not to be carelessness on the part of the father, for a boy of five years of age to be allowed to go into the streets alone, he being proven to be a child of more than ordinary capacity and activity, and capable of taking care of himself;<sup>6</sup> and for an injury to such a boy by a street railroad car, running at extraordinary and reckless speed, in a street crossing where the boy was in the act of crossing, the company was held liable.<sup>7</sup>

And if the infant escape into the public street without the knowledge or permission of those having it in charge, or the

<sup>1</sup> Schierhold, Admr., *v.* North Beach & Mission R. R. Co., 40 Cal. 447.

<sup>2</sup> Schierhold, Admr., *v.* North Beach & Mission R. R. Co., 40 Cal. 447.

<sup>3</sup> Drew *v.* The Sixth Avenue R. R. Co., 26 N.Y. (12 Smith), 49. See also, *Ihl v.* 42d St. & G. Str. Ferry R. R. Co., 47 N. Y. 317; *Farris v.* Cass Ave. & F. G. Ry. Co., 8 Mo. App. 588, 589; S. C. 1 Am. & Eng. R. R. Cas. 622.

<sup>4</sup> Glassey *v.* Hestonville, Mantua & Fairmount Pass. Ry. Co., 57 Penn. St. 172.

<sup>5</sup> Johnson *v.* Chicago & Northwestern Ry. Co., 49 Wis. 529; S. C. 1 Am. & Eng. R. R. Cas. 155; *Hunt v.* Salem, 121 Mass. 294; *Fallon v.* Central Park, N. & E. River R. R. Co., 64 N. Y. 13; *Haycroft v.* Lake Shore

& Mich. Southern Ry. Co., *Id.* 636, 2 Hun, 489; *Bryant v.* Altenbrand, 9 N.Y. Wkly. Dig. 475; *Davis v.* N. Y., N. H. & H. R. R. Co., *Id.* 522; Penn. R. R. Co. *v.* Lewis, 79 Penn. St. 33.

<sup>6</sup> *Barksdull v.* New Orleans & Carrollton R. R. Co., 23 La. An. 180. In this case the Supreme Court of Louisiana, TALIAFERRO, J., say: "There is no question that he was run over while endeavoring to cross" the street. "He had a right to be on the streets, and it was no carelessness in his father to permit him to be upon them." There was no evidence tending to show any want of care in the boy himself.

<sup>7</sup> *Ibid.*

parent or guardian, they having observed ordinary care for its safety, as if, being shut up in the house, it escape through a window which is rather inaccessible, and be injured, it being of too tender years to have its own conduct imputed to it for negligence, neither will the circumstances of such a case be imputed to it as the negligence of those having its care.<sup>1</sup>

So in Pennsylvania, if the infant escape from the care of the parent, or person having the charge of it, without the negligence of the person so controlling it, and go into the public highway, and be there injured by the negligence of another, no negligence will be imputed to the party from whom it thus escapes, if such person be not wanting in ordinary care in respect thereof. Thus where an infant of one and a half years old, being ordinarily barred into the house by a bar placed in the door to prevent it going into the street, taking advantage of a temporary absence of the bar, occasioned by domestic operations of the mother in renovating the floor, escaped into the street, and in a very short time was run over by a passing car and killed, there being no blame or evidence of negligence of the parent, other than these circumstances, it was held by the court not to amount to contributory negligence, and a recovery against the company was sustained.<sup>2</sup>

**7. Actions for injuries alleged to have been caused by negligence.**—When negligence is the alleged cause of action, there are certain leading principles involved, peculiar to such actions, and necessary to be observed in a correct adjudication thereof.

*First:* If neither party be to blame, then there can be no recovery; it is the injured party's misfortune.

*Secondly:* If both parties be to blame, as contributing by neglect, proximately to cause the injury, then, in those places where the rule of contributory negligence prevails, there can be no recovery.<sup>3</sup>

<sup>1</sup> *Mangam v. The Brooklyn R. R. Co.*, 38 N.Y. (11 Tiffany), 455; *Fallon v. Central Park, N. & E. River R. R. Co.*, 64 N. Y. 13; *Farris v. Cass Ave., etc., R. R. Co.*, *supra*.

<sup>2</sup> *Kay v. Penn. R. R. Co.*, 65 Penn. St. 269; *Pitts., Allegh. & Manchester R. W. Co. v. Pearson*, 72 Penn. St. 169; *Phil. & Reading R. R. Co. v.*

*Long*, 75 Penn. St. 257. See, as to when the pecuniary condition of the parents will be considered, as bearing upon their negligence in providing attendants for their children: *Walters v. Chicago, Rock Island & Pac. R. R. Co.*, 41 Ia. 71.

<sup>3</sup> *Rathbun v. Payne*, 19 Wend. 399; *Waldron v. Portland, Saco & Ports-*



*Thirdly:* If both parties are, in like manner as last above stated, to blame, and the injury occur in those countries where the rule of comparative negligence prevails, then the comparative negligence, or degree of culpability, of the parties, is to be considered, weighed, applied and acted on, as laid down under the head of comparative negligence, number 3 of this chapter.

*Fourthly:* If the injury could not have occurred but by the negligence of one of the parties, it then devolves on the plaintiff to show that it was caused by that of the defendant.<sup>1</sup>

*Fifthly:* If negligence be fixed upon the defendant, at the time as alleged against him, yet, before the plaintiff can recover, if the suit be where the rule of contributory negligence prevails, he must show affirmatively that he was himself in the observance of due care on his part to avoid the injury.<sup>2</sup>

*Sixthly:* If the evidence leaves it entirely uncertain whether the injury was occasioned by the fault of the plaintiff or the negligence of the defendant, then the plaintiff can not recover.<sup>3</sup>

*Seventhly:* Negligence is never presumed in law, independent of facts or circumstances, but must be proven;<sup>4</sup> yet this principle is not to be so applied as to excuse the plaintiff from the necessity of showing due care on his part, where the law requires such showing.

In law, the presumption of negligence may arise from facts and circumstances proven or admitted to exist.<sup>5</sup> Thus, in a trial of a cause brought for a personal injury to the plaintiff by a

mouth R. R. Co., 35 Maine, 422; and references in No. 2 of this chapter.

<sup>1</sup> *Waldron v. Portland, Saco & Portsmouth R. R. Co.*, 35 Maine, 422; *Balt. & Ohio R. R. Co. v. Bahrs*, 28 Md. 647; *Frech v. Phil., Wilm. & Balt. R. R. Co.*, 39 Md. 574; *State v. Same*, 47 Md. 76; *Button v. Hudson River R. R. Co.*, 18 N. Y. 251; *Deyo v. N. Y. Cent. R. R. Co.*, 34 N. Y. 9; *Robinson v. Fitchburg & W. R. R. Co.*, 7 Gray, 92; *Shaw v. Boston & Worcester R. R. Co.*, 8 Gray, 45; *Penn. R. R. Co. v. Goodman*, 62 Penn. St. 329; *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 90 Ill. 425.

<sup>2</sup> *Waldron v. Portland, Saco & Portsmouth R. R. Co.*, 35 Maine, 422; *Hinckley v. Cape Cod R. R. Co.*, 120 Mass. 257; *Benton v. Cent. R. R. Co.*, 42 Ia. 192; *Lang v. Holiday Creek R. & C. M. Co.*, 49 Ia. 469; *Le Baron v. Joslin*, 41 Mich. 313; *Chicago City Ry. Co. v. Lewis*, 5 Bradw. (Ill.), 242; *Chicago, Burlington & Quincy R. R. Co. v. Damerell*, 81 Ill. 450; *Indianapolis & St. Louis R. R. Co. v. Evans*, 88 Ill. 63.

<sup>3</sup> *Waldron v. Portland, Saco & Portsmouth R. R. Co.*, 35 Maine, 422.

<sup>4</sup> *Post*, subdn. 9.

<sup>5</sup> *Pennsylvania R. R. Co. v. Books*, 57 Penn. St. 339.

railroad company, incurred by the plaintiff whilst upon a train of the defendant, as a mail agent, proof of habitual drunkenness of the conductor in charge of the train on which plaintiff was injured, raises the presumption of negligence of such conductor, when the question as to his negligence is involved; and such presumption will stand until rebutted by evidence.<sup>1</sup> In the case here cited, of the *Pennsylvania Railroad Company v. Books*, the Supreme Court of Pennsylvania, SHARSWOOD, J., say: "If by direct evidence it appeared that the conductor was a man of intemperate habits, it would cast upon the defendants the burthen of proving that he was not intoxicated at the time, and had used proper care. It is certainly incumbent upon railroad companies to employ none but sober men on their roads. Where a habit of intoxication in a conductor is shown, it raises, in the case of an accident, a presumption of negligence, which stands until it is rebutted."<sup>2</sup> But a basis for such proof must be laid in the plaintiff's declaration.

The negligence of the driver or conductor of a horse railroad car, is no defense to an action by a passenger therein against an ordinary railroad corporation, for an injury inflicted by negligence upon such passenger, by a collision with the horse car. There is no such relation between the horse car driver, conductor, or company, and a passenger on the horse car, as will make their contributory negligence a defense against an action by such passenger against a different company, for an injury inflicted by it.<sup>3</sup>

**8. Negligence as a question of fact for the jury.**—Negligence, in most cases, is a mixed question of law and of fact; and where it is involved in an issue of fact, and there is any conflict of evidence as to the true state of the facts involved, these matters of fact are for the jury to decide.<sup>4</sup> And the *onus* thereof is on the party alleging negligence.

<sup>1</sup> *Ibid.*

<sup>2</sup> *Pennsylvania R. R. Co. v. Books*, 57 Penn. St. 339, 343.

<sup>3</sup> *Bennett v. The New Jersey R. R. & Trans. Co.*, 36 N. J. (7 Vroom), 225; *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. H. R. R. Co.*, 20 N. Y. 492; *S. C. 6 Duer*, 382; *Barrett v. Third Ave. R.*

*R. Co.*, 45 N. Y. 628; *Danville, L. & N. Turnp. R. Co. v. Stewart*, 2 Met. (Ky.), 119.

<sup>4</sup> *Penn. R. R. Co. v. Ogier*, 35 Penn. St. (11 Casey), 60; *McCully v. Clarke & Thaw*, 4 Wright (40 Penn. St.), 406; *Oakland R. W. Co. v. Fielding*, 48 Penn. St. (12 Wright), 320; *Catawissa R. R. Co. v. Armstrong*, 49

In the language of *MERCUR, J.*, in *McKee v. Bidwell*, 74 Penn. St. Rep. 223, "What is and what is not negligence in a particular case, is generally a question for the jury, and not for the court. This arises from the fact that the question of ordinary and rea-

Penn. St. (13 Wright), 186; North Penn. R. R. Co. v. Heileman, 49 Penn. St. 60; Lackawanna & Bloomsburg R. R. Co. v. Doak and another, 52 Penn. St. 379; Pittsburgh, Fort Wayne & Chi. R. R. Co. v. Evans, 53 Penn. St. 250, 254; Glassey v. The Hestonville, Mantua & Fairmount Passenger R. W. Co., 57 Penn. St. 172; Penn. R. R. Co. v. Barnett, 59 Penn. St. 259; Penn. Canal Co. v. Bentley, 66 Penn. St. 30; West Chester & Phila. R. R. Co. v. McElwee, 67 Penn. St. 311; Pennsylvania R. R. Co. v. Ackerman, 74 Penn. St. 265; McKee v. Bidwell, 74 Penn. St. 218, 223; North Penn. R. R. Co. v. Kirk, 90 Penn. St. 15; S. C., 1 Am. and Eng. R. R. Cas. 45; Union Pacific R. W. Co. v. Rollins, 5 Kansas, 167; Tyrrell v. Eastern R. R. Co., 111 Mass. 546, 551; French v. Taunton Branch R. R. Co., 116 Mass. 537; Allender v. Chi., Rock Island & Pacific R. R. Co., 37 Iowa, 264; Johnson and wife v. Winona & St. Peter R. R. Co., 11 Minn. 296; Donaldson v. Milwaukee & St. Paul Ry. Co., 21 Minn. 293, 20 Am. Ry. Rep. 15; Detroit & Mil. R. R. Co. v. Curtis and wife, 23 Wis. 152; Butler, admx., v. Mil. & St. Paul Ry. Co., 28 Wis. 487; Hunkins v. Mil. & St. Paul Ry. Co., 30 Wis. 559; Duffy v. Chicago & N. Western Ry. Co., 32 Wis. 269; Patten v. Chi. & N. Western Ry. Co., 32 Wis. 524; Oldfield v. N. Y. & Harlem R. R. Co., 14 N. Y. (4 Kernan), 310; Sheridan v. Brooklyn City & Newtown R. R. Co., 36 N. Y. (9 Tiffany), 39; Nichols v. Sixth Avenue R. R. Co., 38 N. Y. (11 Tiffany), 131; Filer v. N. Y. Cent. R. R. Co., 49 N. Y. 47; Eaton v. The Erie Ry. Co., 51 N. Y.

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sonable care is generally involved.<sup>1</sup> The degree of care required is changed by the circumstances of the case. Some circumstances require a higher and some a lesser degree of care. Hence generally negligence is a mixed question of law and fact. Under proper instructions it should usually be submitted to the jury, to find whether proper care has been exercised under the particular circumstances."<sup>2</sup> But in no case is it a question of fact exclusively for the jury, for there is some principle of law always

<sup>1</sup> *Smith v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 287; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *Delaware, Lackawanna & Western R. R. Co. v. Napheys*, 90 Penn. St. 135; S. C. 1 Am. and Eng. R. R. Cas. 52; *Mulhaddo v. The Brooklyn City R. R. Co.*, 30 N. Y. (3 Tiffany), 370; *State v. Phil.*, Wilm. & Balt. R. R. Co., *supra*; *Paducah & Memphis R. R. Co. v. Hoehl*, 12 Bush, 41, 18 Am. Ry. Rep. 338; *Stevens v. European & N. Am. Ry.*, 66 Me. 74, 19 Am. Ry. Rep. 48; *Indianapolis & St. Louis R. R. Co. v. Evans*, 88 Ill. 63, 21 Am. Ry. Rep. 284; *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 90 Ill. 425; *Steffen v. Chicago & North Western Ry. Co.*, 46 Wis. 259, 21 Am. Ry. Rep. 385. But see *Kirst v. Milwaukee, Lake Shore & Western Ry. Co.*, 46 Wis. 489, 21 Am. Ry. Rep. 394. But in Tennessee, under the statute giving a right of action to personal representatives for the death of their testator or intestate, it is said the burden of proof is expressly put upon the defendant to show a compliance with the statutory requirements for the prevention of accidents; and this, it is said, is but in affirmance of the common law rule, that the killing being proved, the *onus* is upon the defendant to clear himself of negligence: *Louisville & Nashville R. R. Co. v. Connor*, 9 Heisk. 19, 19 Am. Ry. Rep. 368.

<sup>2</sup> 74 Penn. St. 223. And see also, to this point: *Penn. R. R. Co. v. Bar-*

*nett*, 59 Penn. St. 259; *Penn. Canal Co. v. Bentley*, 66 Penn. St. 30; *West Chester & Phila. R. R. Co. v. McElwee*, 67 Penn. St. 311; *Pennsylvania R. R. Co. v. Fortney*, 90 Penn. St. 323; S. C. 1 Am. and Eng. R. R. Cas. 128; *Gaynor v. Old Colony & Newport Ry. Co.*, 100 Mass. 208; *Eagan v. Fitchburg R. R. Co.*, 101 Mass. 315; *Chaffee v. Boston & Lowell R. R. Co.*, 104 Mass. 108; *Coleman v. New York & New Haven R. R. Co.*, 106 Mass. 160; *Craig v. N. Y., N. H. & H. R. R. Co.*, 118 Mass. 431; *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47; *Thurber v. Harlem Bridge, Morrisania & Fordham R. R. Co.*, 60 N. Y. 326, 10 Am. Ry. Rep. 126; *Mowrey v. Cent. City Ry. Co.*, 51 N. Y. 666, 66 Barb. 43; *Terry v. Jewett*, 78 N. Y. 338, 17 Hun, 395; *Casey v. N. Y. Cent. & H. R. R. Co.*, 6 Abb. N. C. 104, 78 N. Y. 518; *Pendril v. Second Ave. R. R. Co.*, 34 N. Y. Superior, 481; *Hawley v. Northern Cent. Ry. Co.*, 17 Hun, 115; *Mahar v. Grand Trunk Ry. Co.*, 19 Hun, 32; *Cent. R. R. Co. of New Jersey v. Moore*, 4 Zab. (N. J.), 824; *Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. Ry. Rep. 172; *Baltimore & Ohio R. R. Co. v. Whittaker*, 24 Ohio St. 642, 7 Am. Ry. Rep. 182; *Marietta & Cincinnati R. R. Co. v. Picksley*, 24 Ohio St. 654, 7 Am. Ry. Rep. 186; *McNamara v. North Pacific R. R. Co.*, 50 Cal. 581, 12 Am. Ry. Rep. 190; *Belair v. Chicago & N. W.*

applicable to the particular state of facts, which must be laid down by the court, and by which the jury are to be guided.<sup>1</sup>

In *West Chester & Phila. R. R. Co. v. McElwee*, just cited, the court say: "It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is not fixed, but variable. Under some circumstances a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with."<sup>2</sup> So where the measure of duty is not unvarying, and where both duty and a party's conformity thereto are to be ascertained as facts, a jury alone are proper to determine what constitutes negligence in the particular case, and whether it has been proved.<sup>3</sup>

R. R. Co., 43 Ia. 662, 14 Am. Ry. Rep. 575; *Bessex v. Chicago & North Western Ry. Co.*, 45 Wis. 477, 18 Am. Ry. Rep. 58; *Indianapolis & St. Louis R. R. Co. v. Evans*, 88 Ill. 63, 21 Am. Ry. Rep. 284; *Cohen v. Eureka & P. R. R. Co.*, 14 Nev. 376; *Cent. Branch Union Pac. R. R. Co. v. Hotham*, 22 Kans. 41; *Kans. Cent. Ry. Co. v. Fitzsimmons*, *Id.* 686; *Houston & Great Northern R. R. Co. v. Miller*, 51 Tex. 270. Whether blows given while expelling one rightfully from the cars were necessarily given, is a question of fact for the jury: *Coleman v. The N. York & N. Haven R. R. Co.*, *supra*. But if the facts are undisputed, then the court is to decide: *Cent. R. R. Co. v. Moore*, *supra*.

<sup>1</sup> *Lake Shore & Mich. S. R. R. Co. v. Miller*, 25 Mich. (3 Post), 274, 294, 295. What is proper care is a question of law; whether it has been exercised is a question of fact: *Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25; *S. C.*, 1 Am. and Eng. R. R. Cas. 115.

<sup>2</sup> 67 Penn. St. 315; *Glassey v. The Hestonville, Mantua & Fairmount Passenger R. W. Co.*, 57 Penn. St. 172;

*Penn. R. R. Co. v. Barnett*, 59 Penn. St. 259; *Crисsey v. Hestonville, M. & F. P. Ry. Co.*, 75 *Id.* 83; *State v. Manchester & L. R. R. Co.*, 52 N. H. 563.

<sup>3</sup> *North Penn. R. R. Co. v. Heileman*, 49 Penn. St. (13 Wright), 60; *Glassey v. The Hestonville, Mantua & Fairmount Passenger Ry. Co.*, 57 Penn. St. 172; *Penn. R. R. Co. v. Barnett*, 59 Penn. St. 259; *West Chester & Phila. R. R. Co. v. McElwee*, 67 Penn. St. 311, 315; *Phil. & Reading R. R. Co. v. Killips*, 88 Penn. St. 405; *Gaynor v. Old Colony & Newport Ry. Co.*, 100 Mass. 208; *Coleman v. N. York & N. Haven R. R. Co.*, 106 Mass. 160; *Chaffee v. Boston & Lowell R. R. Co.*, 104 Mass. 108; *Bayley v. Eastern R. R. Co.*, 125 Mass. 62; *Linnahan v. Sampson*, 126 *Id.* 506; *Edson v. Central R. R. Co.*, 40 Ia. 47, 8 Am. Ry. Rep. 412; *Henry v. Southern Pacific R. R. Co.*, 50 Cal. 176, 12 Am. Ry. Rep. 168; *Fernandes v. Sacramento City Ry. Co.*, 52 Cal. 45, 9 Am. Ry. Rep. 352; *Texas & Pacific Ry. Co. v. Murphy*, 46 Tex. 356, 13 Am. Ry. Rep. 319; *Bonnell v. Delaware, Lackawanna & Western R. R. Co.*, 39 N.

"The rule is well settled," says MASON, J., "that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be deduced from a variety of circumstances in regard to which there is room for fair difference of opinion among intelligent men."<sup>1</sup>

The prevailing rule in Missouri is, that where there is any conflict of evidence in regard to the issues involving negligence, the question of negligence is to be left to the jury upon the evidence, under instructions from the court.<sup>2</sup>

The safer way, however, in cases involving the question of negligence, is to take a special verdict, finding all the material facts of the case. The question of negligence then becomes a question of law, and may be dealt with accordingly.<sup>3</sup> The rule in Kansas is, that negligence, if there is controversy about the facts, or inferences to be drawn from the evidence, is a question of fact for the jury; but if the facts be all one way, or there is no controversy about them, then negligence is a question of law, for the court to determine. So, also, it is matter of law for the

J. 189, 14 Am. Ry. Rep. 220; *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245; *Kansas Pac. Ry. Co. v. Twombly*, 3 Col. 125; *Ditberner v. Chicago. Milwaukee & St. Paul Ry. Co.*, 47 Wis. 138, 21 Am. Ry. Rep. 37; *Hartwig v. Chicago & Northwestern Ry. Co.*, 49 Wis. 358; S. C. 1 Am. & Eng. R. R. Cas. 65; *Hackford v. N. Y. Cent. & H. R. R. Co.*, 53 N. Y. 654, 43 How. Pr. 222; *Belton v. Baxter*, 54 N. Y. 245, 58 N. Y. 411; *Massoth v. Del. & H. C. Co.*, 64 N. Y. 524; *Wood v. N. Y. Cent. & Hudson River R. R. Co.*, 70 N. Y. 195, 18 Am. Ry. Rep. 548; *Leonard v. N. Y. Cent. & Hudson River R. R. Co.*, 42 N. Y. Superior, 225; *Balt. & Ohio R. R. Co. v. Whittaker*, 24 Ohio St. 642; *Same v. Whitacre*, 35 *Id.* 627; *Carrington v. Ficklin*, 32 Gratt. 670; *Hawker v. Balt. & Ohio R. R. Co.*, 15 W. Va. 628; *Solen v. Virginia & Truckee R. R. Co.*, 13 Nev. 106; *State v. Manchester & L. R. R. Co.*, 52 N. H. 528;

*Balt. & Ohio R. R. Co. v. Fitzpatrick*, 35 Md. 32; *McMahon v. Northern Cent. Ry. Co.*, 39 Md. 438.

<sup>1</sup> *Wolfkiel v. Sixth Avenue R. R. Co.*, 38 N. Y. 50, 51. And to same point, see *Ernst v. The Hudson River R. R. Co.*, 35 N. Y. 9.

<sup>2</sup> *Schultz v. Pacific R. R. Co.*, 36 Mo. 13; *Smith v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 287; *Tarwater v. Hannibal & St. Joe R. R. Co.*, 42 Mo. 193; *McPheeters v. Hannibal & St. Joe R. R. Co.*, 45 Mo. 22; *Tabor v. The Missouri Valley R. R. Co.*, 46 Mo. 353; *Burns v. Bellefontaine R. W. Co. of St. Louis*, 50 Mo. 139; *Brown v. Hannibal & St. Joe R. R. Co.*, 50 Mo. 461.

<sup>3</sup> *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Evans*, 53 Penn. St. 250, 254. See, as to when a special finding as to negligence is inconsistent with the verdict: *Goltz v. Winona & St. Peter R. R. Co.*, 22 Minn. 55, 19 Am. Ry. Rep. 359; *Haas v. Chicago &*

court to determine what degree of care on one side, and of negligence on the other, will enable the plaintiff to recover.<sup>1</sup>

But when there is no conflict of testimony, and the existence of a certain state of facts is clearly proven, the court is to hold that such state of facts is established; it is error to refer the same to the jury for their finding.<sup>2</sup> And where all the material facts, when found, admit of no rational inference but that of negligence, then the question of negligence becomes a matter of law merely.<sup>3</sup> It is said, in an English case, that whether there is reasonable evidence of negligence to be left to the jury, is a question for the court; it is for the jury to say whether, and how far, the evidence is to be believed.<sup>4</sup>

The instructions should refer to the circumstances of the case, and be so given as to secure the fair consideration and judgment of the jury upon the points at issue.<sup>5</sup> A charge which consists mainly of extracts from reported cases, having no special reference to the circumstances of the case on trial, is objectionable; and if the jury have been misled thereby, a new trial will be granted.<sup>6</sup>

Northwestern Ry. Co., 41 Wis. 44; Kearney v. Chicago, Milwaukee & St. Paul Ry. Co., 47 *Id.* 144, 21 Am. Ry. Rep. 43. And see, as to when the answers of the jury will be deemed evasive: Urbanek v. C., M. & St. P. Ry. Co., 47 Wis. 59, 21 Am. Ry. Rep. 58.

<sup>1</sup> Union Pacific R. W. Co. v. Rollins, 5 Kansas, 177, 181, 182.

<sup>2</sup> Langhoff v. Mil. & Prairie du Chien Ry. Co., 23 Wis. 43; Spaulding v. Chi. & N. W. Ry. Co., 33 Wis. 582, 591; Storey v. Brennan, 15 N. Y. 524; White v. Stillman, 25 N. Y. 541; Goodman v. Simonds, 20 How. 359.

<sup>3</sup> Cleveland, Columbus & Cincinnati R. R. Co. v. Crawford, 24 Ohio St. 631, 7 Am. Ry. Rep. 172.

<sup>4</sup> Directors, etc., of Metropolitan Ry. Co. v. Jackson, Law Rep., 3 App. Cas. 193, 15 Am. Ry. Rep. 621. And see Indianapolis & St. Louis R. R. Co. v. Estes, 96 Ill. 470; S. C. 1 Am. and Eng. R. R. Cas. 622; Nagle v. Alle-

gheny Valley R. R. Co., 88 Penn. St. 35.

<sup>5</sup> Baltimore & Ohio R. R. Co. v. Whittaker, 24 Ohio St. 642, 7 Am. Ry. Rep. 182; Marietta & Cincinnati R. R. Co. v. Picksley, 24 Ohio St. 654, 7 Am. Ry. Rep. 186. Where the evidence is conflicting, the jury should be accurately instructed: Chicago City Ry. Co. v. Freeman, 6 Bradw. (Ill.), 608; Stratton v. Central City Horse Ry. Co., 95 Ill. 25; S. C. 1 Am. and Eng. R. R. Cas. 115. But all the law of negligence is not required to be embodied in one instruction, nor all the exceptions to the general rule stated: Stratton v. C. C. H. Ry. Co., *supra*.

<sup>6</sup> B. & O. R. R. Co. v. Whittaker, and M. & C. R. R. Co. v. Picksley, *supra*. And see, as to when instructions may assume certain facts to be negligence: Toledo, Peoria & Warsaw Ry. Co. v. Bray, 57 Ill. 514, 10 Am. Ry. Rep. 441. In Texas & Pacific Ry.

In some states, the question of proximate cause in case of damage by fire, is submitted to the jury as a question of fact;<sup>1</sup> but where the facts are undisputed, and the intervening agency is manifest, the court may withhold the evidence from the jury.<sup>2</sup>

**9. Proof of negligence.**—Proof of negligence may be made, as of any other issue necessary to be established, by direct evidence of the facts which constitute it, or by such circumstances as in law will raise a presumption thereof;<sup>3</sup> for although negli-

Co. v. Murphy, 46 Tex. 356 (13 Am. Ry. Rep. 319), however, it is said to be error to instruct a jury that certain facts constitute negligence, in the absence of any law to that effect. But the court say, in the same case, that if the acts of negligence be extreme, and clearly established by uncontradicted evidence, that the court would not disturb a verdict rendered on such charge, if the party is uninjured by it. Where the jury have been properly instructed, and there is a verdict for the plaintiff, they will be presumed to have passed upon the negligence of both parties: *Hartwig v. Chicago & Northwestern Ry. Co.*, 49 Wis. 358; S. C. 1 Am. and Eng. R. R. Cas. 65.

<sup>1</sup> *Perry v. Southern Pacific R. R. Co.*, 50 Cal. 578, 12 Am. Ry. Rep. 187; *Clemens v. Hannibal & St. Joseph R. R. Co.*, 53 Mo. 366, 12 Am. Ry. Rep. 351; *Fent v. Toledo, Peoria & Warsaw Ry. Co.*, 59 Ill. 349; *Delaware, Lackawanna & Western R. R. Co. v. Salmon*, 39 N. J. 299, 14 Am. Ry. Rep. 226; *Penn. R. R. Co. v. Hope*, 80 Penn. St. 373; *Hoag v. Lake Shore & Mich. So. R. R. Co.*, 85 Penn. St. 293, 18 Am. Ry. Rep. 405; *Penn. & N. Y. Canal & R. R. Co. v. Lacey*, 89 *Id.* 458; *Atchison, Topeka & Santa Fe R. R. Co. v. Bales*, 16 Kans. 252.

<sup>2</sup> *Hoag v. L. S. & M. S. R. R. Co.*, *supra*.

<sup>3</sup> *Calvert v. Hannibal & St. Joe R. R. Co.*, 38 Mo. 467; *Sheldon v. Hud-*

son River R. R. Co., 14 N. Y. (4 Kernan), 218; *Del. & W. R. R. Co. v. Napheys*, *supra*. A violation of defendant's rules is competent evidence upon the question of negligence: *Wood v. N. Y. Cent. & H. R. R. Co.*, 70 N. Y. 195, 18 Am. Ry. Rep. 548. And to show this, a book containing the rules is admissible in evidence: *Hobbs v. Eastern R. R. Co.*, 66 Me. 572, 19 Am. Ry. Rep. 210. And so is evidence of an agreement between two railroad companies that one shall have the right of way at a common crossing: *Wood v. N. Y. C. & H. R. R. Co.*, *supra*. But where an injury has been caused by the subversion of a bridge, the construction of another in its place in a different manner, although an acknowledgment of the defective construction of the former, is no evidence that such defects are attributable to negligence: *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245. And see *Dale v. Del. & Western R. R. Co.*, 73 N. Y. 468; *Salters v. Del. & Hudson Canal Co.*, 3 Hun, 338; *Payne v. Troy & B. R. R. Co.*, 9 Hun, 526. But see *Westfall v. Erie Ry. Co.*, 5 Hun, 75; *Harvey v. N. Y. Cent. & H. R. R. Co.*, 19 Hun, 556. An offer by the company to pay the funeral expenses of a person injured by its cars is not admissible: *Campbell v. Chi., R. I. & P. Ry. Co.*, 45 Ia. 76. Evidence of floods occur-



gence will not be presumed, as an independent intendment not resting on any established fact,<sup>1</sup> yet circumstances and facts may be proven which will raise the presumption thereof in law.<sup>2</sup>

Where an injury occurred from the improper construction of a depot platform, and immediately thereafter the company caused the same to be changed, evidence of such change was adjudged proper to go to the jury, as tending to show a recognition on the part of the company of such improper construction.<sup>3</sup>

And so, where the injured person was awaiting the arrival of a train which was behind time, and on which he purposed to leave, but was in the meantime injured at the depot by another train which arrived whilst he was there waiting, evidence of the delay of the train on which he designed to depart was allowed to go to the jury, as a circumstance bearing on the question of negligence;<sup>4</sup> but, to our mind, with doubtful propriety, as such delay could in no manner contribute to the bringing about the injury, nor afford any reason for the injured party to

ring subsequent to the accident, offered to show negligence in not providing for such occurrences, is incompetent: *Kans. Pac. Ry. Co. v. Miller, supra*.

<sup>1</sup>*Smith v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 287; *Penn. R. R. Co. v. Goodman*, 62 Penn. St. 329, 338; *Delaware, Lackawanna & Western R. R. Co. v. Napheys*, 90 Penn. St. 135; *S. C. 1 Am. and Eng. R. R. Cas.* 52; *Sheldon v. The Hudson River R. R. Co.*, 14 N. Y. (4 Kernan), 218; *Field v. New York Cent. R. R. Co.*, 32 N. Y. 339. In Arkansas it is held that negligence is presumed in case of injury to a passenger without fault on his part: *George v. St. Louis, Iron M. & Southern Ry. Co.*, 34 Ark. 613; *S. C. 1 Am. and Eng. R. R. Cas.* 294.

<sup>2</sup>*Brown v. Hannibal & St. Joe R. R. Co.*, 33 Mo. 309; *Smith v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 287; *Calvert v. Hannibal & St. Joe R. R. Co.*, 38 Mo. 467; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315; *Pennsylvania R. R. Co. v. Books*, 57 Penn.

St. 339; *Sheldon v. Hudson River R. R. Co.*, 14 N. Y. (4 Kernan), 218; *Field v. New York Cent. R. R. Co.*, 32 N. Y. (5 Tiffany), 339; *Webb v. The Rome, Watertown & Ogdensburg R. R. Co.*, 49 N. Y. (4 Sickels), 420. *Taus*, in *Kirst v. Milwaukee, Lake Shore & Western Ry. Co.*, 46 Wis. 489, 21 Am. Ry. Rep. 394, it was held that where plaintiff showed injury to his goods while in the possession of the defendant, which injury occurred in the performance of an act which, when performed with due care, does not ordinarily cause such injury, it was held this was evidence from which the jury might infer negligence.

<sup>3</sup>*Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315. But where a passenger, in stepping from a platform, fractures her knee-cap without any apparent external cause, no presumption of negligence arises: *D., L. & W. R. R. Co. v. Napheys, supra*.

<sup>4</sup>*Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315.

be upon the platform, where he was neither leaving, arriving, nor having any business.

And so it has been held, on a question of alleged negligence of a railroad company, in an action for damages by fire, charged to have been communicated from a locomotive engine of the company, that evidence was proper to go to the jury to prove that there were coals on the track at the time and place at which the fire was communicated or occurred, and at other times not long therefrom, as tending to show negligence in the manner of using the engines of the company, and also in the condition of the engines in respect to having proper preventatives against the escape of fire.<sup>1</sup> But the repeated firing of the company's grounds, or those of an adjoining landholder, at a particular place on the road, is not alone competent evidence to raise an inference of negligence on the part of the company; and therefore, where the court charged the jury that such circumstances were proper for their consideration, as in itself evidence of negligence, judgment having gone for the plaintiff, it was, by reason of such charge, and for other reasons, reversed.<sup>2</sup>

And where, on account of the coldness of the weather, all the employes of a train are upon the engine, so that the only means of stopping it, or checking its speed, are those controlled by the engineer, it is negligence on the part of the company.<sup>3</sup>

In Indiana, under a general charge of negligence in the petition or declaration, any degree of negligence may be proven;<sup>4</sup>

<sup>1</sup> *Webb v. The Rome, Watertown & Ogdensburgh R. R. Co.*, 49 N. Y. 420; *Westfall v. Erie Ry. Co.*, 5 Hun, 75; *Hoyt v. Jeffers*, 30 Mich. 190; *Cleveland v. Grand Trunk Ry. Co.*, 42 Vt. 449; *Henry v. Southern Pac. R. R. Co.*, 50 Cal. 176; *Longabaugh v. Va. City & T. R. R. Co.*, 9 Nev. 271; *Piggot v. Eastern Counties Ry. Co.*, 3 Coll. B. 229.

<sup>2</sup> *Phila. & Reading R. R. Co. v. Yeiser*, 8 Penn. St. (8 Barr), 366; *Balt. & Susq. R. R. Co. v. Woodruff*, 4 Md. 242; *Lester v. Kansas City, St. Jos. & C. B. R. R. Co.*, 60 Mo. 265; *Edwards v. Ottawa River Nav. Co.*, 39 Upp. Can., Q. B., 264.

<sup>3</sup> *St. Louis & Southeastern Ry. Co. v. Mathias*, 50 Ind. 65, 8 Am. Ry. Rep. 381.

<sup>4</sup> *Indianapolis, P. & C. R. R. Co. v. Keely*, 23 Ind. 133; *Jeffersonville, Mad. & Ind. R. R. Co. v. Hendricks*, 41 Ind. 48; *Penn. Co. v. Krick*, 47 Ind. 368; *Jackson v. Indianapolis & St. Louis R. R. Co.*, 47 Ind. 454; *Allender v. Chi., Rock Isl'd & Pacific R. R. Co.*, 37 Iowa, 264. And see *Lalor v. Chi., B. & Q. R. R. Co.*, 52 Ill. 401; *Ind. & St. Louis R. R. Co. v. Evans*, 88 Ill. 63. On appeal, a judgment will not be reversed on the mere weight of evidence of negligence, where there is evidence to support the

and although there is no statute in said state making it the duty of railroad companies to ring a bell or blow the whistle of the locomotive at crossings of public highways, yet the omission to do so may amount to negligence, according to circumstances; and whether it does or does not, in a given case, is for the jury to decide, under the evidence and the charge of the court.<sup>1</sup> But proof of injury at a highway crossing raises no presumption of negligence on the part of the company.<sup>2</sup>

The explosion of an engine boiler is *prima facie* evidence of negligence on the part of the railroad company owning and operating the same.<sup>3</sup> The burden of proof is thereby thrown upon the company to show to the contrary;<sup>4</sup> and this presumption, arising from such *prima facie* evidence, is overcome by proof that the iron is of the kind usually used for boilers, was subjected to and stood the usual tests, and that the boiler was used by experienced persons, with prudence and skill.<sup>5</sup> And so getting off the track, where no interference or obstruction from outside parties is shown, is *prima facie* evidence of negligence.<sup>6</sup>

finding: *Madison & Indianapolis R. R. Co. v. Taffe*, 37 Ind. 361, 5 Am. Ry. Rep. 422; but where the record shows no negligence on the part of the defendant, it will: *Chicago & Alton R. R. Co. v. Mock*, 88 Ill. 87, 21 Am. Ry. Rep. 287.

<sup>1</sup> *Indianapolis, Cin. & Lafayette R. R. Co. v. Hamilton*, 44 Ind. 76.

<sup>2</sup> *Chicago City Ry. Co. v. Lewis*, 5 Bradw. (Ill.), 242; *Elliott v. St. Louis & Iron Mountain R. R. Co.*, 67 Mo. 272; *Williams v. Great Western Ry. Co.*, Law Rep. 9 Exch. 157.

<sup>3</sup> *Ill. Cent. R. R. Co. v. Phillips*, 49 Ill. 234; *Ill. Cent. R. R. Co. v. Phillips*, 55 Ill. 194, 199; *Toledo, Wabash & Western Ry. Co. v. Moore*, 77 Ill.

217. But see *Ill. Cent. R. R. Co. v. Houck*, 72 Ill. 285; *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kans. 83.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Phillips*, 55 Ill. 194, 199; *T., W. & W. Ry. Co. v. Moore*, *supra*.

<sup>5</sup> *Ill. Cent. R. R. Co. v. Phillips*, 55 Ill. 194, 199.

<sup>6</sup> *Feital v. Middlesex R. R. Co.*, 109 Mass. 398; *Stevens v. European & N. Am. Ry.*, 66 Me. 74; *S. C. 19 Am. Ry. Rep.* 48; *Peoria, Pekin & Jacksonville R. R. Co. v. Reynolds*, 88 Ill. 418; *S. C. 21 Am. Ry. Rep.* 324; *George v. St. Louis, Iron Mountain & Southern Ry. Co.*, 34 Ark. 613; *S. C. 1 Am. & Eng. R. R. Cas.* 294.

## CHAPTER LII.

### PERSONAL INJURY TO PASSENGERS.

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**1. From defective roads and appliances.**—It is the duty of railroad corporations, operating their roads as common carriers of passengers, to avail themselves of proper and competent engineering skill and work in the construction of their roads, and in the selection and use of the appliances and means used in operating the same, with a view to the safety of passengers, so far as safety may be attained to by the utmost skill, diligence and care in that respect, and to resort, from time to time, to the best known means and tests for detecting defects and insecurities; and for injuries occasioned by omission so to do, they are

liable in damages, if the injured party observe due care to avoid the injury.<sup>1</sup>

And a railroad company is liable for an injury caused by falling through a bridge over a public street in a city, while the plaintiff was attempting to get on the train of the defendant. It is the duty of the company to have such a bridge properly covered or protected, so as to prevent injuries.<sup>2</sup>

The opinion of the conductor of the train on which the accident occurred, is not admissible as expert testimony, to show that if proper guard chains had been provided, connecting the trucks with the body of the car, the accident would not have happened;<sup>3</sup> but inasmuch as in this case the conductor also testified that if such chains had been on the car as were subsequently put on when the car was repaired, they would not have held the truck to the car, it was held the defendant was not prejudiced thereby, and therefore it could not be assigned for error.<sup>4</sup>

Where the plaintiff's intestate was injured by the subversion of a bridge, by which a train was wrecked, it was held that the subsequent construction of a new bridge in a different manner amounted to an admission that the former one was improperly constructed, but not that such defects were attributable to negli-

<sup>1</sup>Virginia Cent. R. R. Co. v. Sanger, 15 Gratt. 230; Baltimore & Ohio R. Co. v. Wightman, 29 Gratt. 431, 17 Am. Ry. Rep. 351; Muldowney v. Ill. Cent. Ry. Co., 36 Iowa, 462; Cumberland Valley R. R. Co. v. Hughes, 11 Penn. St. 141; Pittsburg, Fort Wayne & Chicago Ry. Co. v. Gilleland, 56 Penn. St. 445; Meier v. Penn. R. R. Co., 64 Penn. St. 225; Oliver v. New York & Erie R. R. Co., 1 Edmonds (N. Y.), 589; Reed v. N. Y. Central R. R. Co., 56 Barbour, 493; Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 7 Am. Ry. Rep. 25; Nashville & Decatur R. R. Co. v. Jones, 9 Heisk. 27, 19 Am. Ry. Rep. 261; Peoria, Pekin & Jacksonville R. R. Co. v. Reynolds, 88 Ill. 418, 21 Am. Ry. Rep. 324; Pennsylvania Co. v. Roy, 102 U. S. 451; S. C. 1 Am. & Eng. R. R. Cas. 225. The case last cited was of an

injury by the fall of a berth in a sleeping car. Proof of the condition of the track far distant from the place of accident, is inadmissible: Holyoke v. Grand Trunk Ry. Co., 48 N. H. 541; Louisville & Nashville R. R. Co. v. Fox, 11 Bush (Ky.), 495, 14 Am. Ry. Rep. 374; Grand Rapids & Ind. R. R. Co. v. Huntley, 38 Mich. 537. They are not insurers, however, against the negligence of manufacturers: N. & D. R. R. Co. v. Jones, *supra*.

<sup>2</sup>Chicago & Northwestern Ry. Co. v. Fillmore, 57 Ill. 265, 10 Am. Ry. Rep. 462.

<sup>3</sup>Bixby v. Montpelier & St. Johnsbury R. R. Co., 49 Vt. 123, 17 Am. Ry. Rep. 140.

<sup>4</sup>*Ibid*. See also, as to evidence of the contract of carriage, where there are connecting lines—Same case.

gence.<sup>1</sup> It is the duty of the company, in building bridges, to use due diligence to ascertain the likelihood of floods and freshets; and if indications exist of former floods, it is gross negligence to construct the bridge with approaches of light and unsubstantial soil, reaching out into the channel.<sup>2</sup>

**2. From negligence in operating the road.**—The obligations and duties of railroad corporations as common carriers of persons, bind them to the observance of the highest degree of diligence and care in behalf of the safety of the persons of those traveling as passengers upon their trains; and although the common law doctrine, as to insurance of goods carried by such companies, does not apply to them as carriers of passengers, yet they are required to use the utmost care, in the conduct of their business, to avoid injury to their passengers, that the nature of the case will admit of.<sup>3</sup> They are not liable, however, for injuries arising from inevitable accident, or from causes beyond their control.<sup>4</sup>

This same degree of care is required, too, in regard to the suitability of the means used for transportation, and as to the fitness of the employes and persons operating and controlling the same.<sup>5</sup>

The result of this principle is, that for injuries sustained by passengers, by reason of the want of such diligence and care in respect to any of these requirements, the companies are liable to respond in damages in an action, if the injured party has him-

<sup>1</sup>Kansas Pacific Ry. Co. v. Miller, 2 Col. 442, 20 Am. Ry. Rep. 245. That is a question for the jury: *Ibid.*

<sup>2</sup>*Ibid.*

<sup>3</sup>Taylor v. Grand Trunk R. W. Co., 48 N. H. 304; S. C. 2 Am. R. 229; Phil. & Reading R. R. Co. v. Derby, 14 How. 486; Fuller v. Naugatuck R. R. Co., 21 Conn. 557; McElroy and wife v. Nashua & Lowell R. R. Co., 4 Cush. 400; Wheaton v. North Beach & Mission R. R. Co., 36 Cal. 590; Meier v. Penn. R. R. Co., 64 Penn. St. 225; Union Pac. Ry. Co. v. Hand, 7 Kansas, 380; Jeffersonville R. R. Co. v. Hendricks, 26 Ind. 228; Toledo, Wabash & Western Ry. Co. v. Apper-

son, 49 Ill. 480; Virginia Cent. R. R. Co. v. Sanger, 15 Gratt. 230; Baltimore & Ohio R. R. Co. v. Wightman, 29 Gratt. 431, 17 Am. Ry. Rep. 351; Hardy v. N. Car. Cent. R. R. Co., 74 N. Car. 734, 13 Am. Ry. Rep. 121.

<sup>4</sup>Pittsburg, Fort Wayne & Chi. Ry. Co. v. Gilleland, 56 Penn. St. 445. And the same rules apply to railroad companies operating steam vessels for the carriage of passengers: Carroll v. Staten Island R. R. Co., 58 N. Y. 126, 7 Am. Ry. Rep. 25.

<sup>5</sup>Pittsburg, Fort Wayne & Chi. Ry. Co. v. Gilleland, 56 Penn. St. 445; Meier v. Penn. R. R. Co., 64 Penn. St. 225.

self observed due and ordinary care on his part to avoid the injury, and has not by his own negligence contributed thereto.<sup>1</sup>

**3. From negligence of two or more companies.**—A passenger receiving an injury in a conveyance over which he has no control, is not chargeable, as for contributory negligence, with the negligence of a driver or conductor of such conveyance, as an objection to his recovery against another company, corporation, or person, for injuries resulting from their negligence.<sup>2</sup> But such passenger will be entitled to his action against the one or the other of the companies, or against them both jointly, for an injury occasioned by their mutual negligence, provided he himself is guilty of no act which tended to bring about the collision or other cause of the injury; and this, too, although such passenger may have been in other respects guilty of negligence.<sup>3</sup>

<sup>1</sup> *Taylor v. Grand Trunk R. W. Co.*, 48 N. H. 304; *Phila. & Reading R. R. Co. v. Derby*, 14 How. 486; *Card v. New York & Harlem R. R. Co.*, 50 Barbour (N. Y.), 39; *Walker v. Erie Ry. Co.*, 63 Barbour, 260; *Hanley v. Harlem R. R. Co.*, 1 Edmonds (N. Y.), 359; *Hardy v. N. Car. Cent. R. R. Co.*, 47 N. Car. 734, 13 Am. Ry. Rep. 121. For the purpose of showing negligence in this respect, consisting in a violation of the rules of the company by employes, a book containing such rules is admissible in evidence: *Hobbs v. Eastern R. R. Co.*, 66 Me. 572, 19 Am. Ry. Rep. 210. Where the plaintiff declares upon a particular species of negligence, he must so recover; he can not make proof of negligence in another particular: *Toledo, Wabash & Western Ry. Co. v. Foss*, 88 Ill. 551, 21 Am. Ry. Rep. 368.

<sup>2</sup> *Chapman v. New Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. York & N. Haven and N. York & Harlem R. R. Cos.*, 20 N. Y. 492; *S. C. 6 Duer*, 382; *Barrett v. The Third Avenue R. R. Co.*, 45 N. Y. (6 Hand), 628; *Wylde v. Northern R. R. Co. of N. J.*, 53 N. Y. 156; *Bennett v. N. J. R. R. & T. Co.*, 7 Vroom, 225; *Danville, L. & N.*

*Turnp. R. Co. v. Stewart*, 2 Met. (Ky.), 119. "The rule of law is, that when a third party has sustained an injury to his property from the co-operating consequences of two causes, though the persons producing them may not be in intentional concert to occasion such a result, the injured person is entitled to compensation for his loss from either one or both of them": Per WAYNE, Justice, in the case of *The Steamer New Philadelphia*, 1 Black, 62, 76. *Contra*, *Thorogood v. Bryan*, 8 C. B. 115; *Child v. Hearn*, Law Rep. 9 Exch. 176; *Armstrong v. Lancashire & Y. Ry. Co.*, 10 *Id.* 47. See *Prideaux v. City of Mineral Point*, 43 Wis. 513.

<sup>3</sup> *Chapman v. The N. Haven R. R. Co.*, 19 N. Y. 341; *Colegrove v. N. Y. & N. Haven and N. Y. & Harlem R. R. Cos.*, 20 N. Y. 492; *Brown v. N. Y. Cent. R. R. Co.*, 32 N. Y. 597; *Wylde v. Northern R. R. Co.*, *supra*; *Foulkes v. Met. Dist. Ry. Co.*, Law Rep. 5 C. P. Div. 157; *S. C. 4 Id.* 267; *Vary v. Burlington, Cedar Rapids & Mo. River R. R. Co.*, 42 Ia. 246. But see *Berringer v. Great Eastern Ry. Co.*, Law Rep. 4 C. P. Div. 163.

The party, however, is entitled to but one satisfaction.<sup>1</sup> If he settles with one company, and discharges it from liability for the injury, the discharge or release inures also to the benefit and discharge of the other. The release of, or compensation accepted as satisfaction from, one of two or more tort feorsors releases the others.<sup>2</sup>

And likewise, where two or more roads assume to become and be consolidated into one body, and practically act upon that assumption in the carrying of passengers, and an injury is inflicted by such companies, so acting in their united capacity, upon a passenger on one of their trains, by reason of such negligence on their part as would otherwise entitle him to an action if inflicted by a company acting in its legitimate individual character, the person thus injured is entitled to recover against the several roads so inflicting the injury, and may thus sue them in such assumed joint capacity, although the supposed consolidation of the several roads may be unauthorized in law, and may be without technical legality. They will not be permitted to deny the legality thereof as a defense to an action growing out of transactions based upon the supposition, either in law or in fact, of the existence thereof.<sup>3</sup>

**4. From obstruction to town or city ways.**—If a railroad company, in the lawful construction of their road, so obstruct a public highway as to render it dangerous to the public, the company will be liable for an injury occasioned thereby; this, too, whether the work be executed by the company directly, or by a contractor engaged to construct the same.<sup>4</sup> And if the defect be such as to render liable a town corporation within the limits of which the defect occurs, for injuries sustained by reason of such defect or obstruction, and recovery is had for the same against the town, then the latter has recourse against the railroad company for the amount of such recovery, so far as regards the amount of single damages recovered.<sup>5</sup> But in case the recovery

<sup>1</sup> *Barrett v. The Third Avenue R. R. Co.*, 45 N. Y. (6 Hand), 628.

<sup>2</sup> *Barrett v. The Third Avenue R. R. Co.*, 45 N. Y. (6 Hand), 628.

<sup>3</sup> *Bissell v. The Michigan Southern & N. Ind. R. R. Co.*, 22 N. Y. 258.

<sup>4</sup> *Lowell v. The Boston & Lowell R. R. Co.*, 23 Pick. 24.

<sup>5</sup> *Lowell v. The Boston & Lowell R. R. Co.*, 23 Pick. 24; *Proprs. of Locks & Canals v. Lowell Horse R. R. Co.*, 109 Mass. 221; *Woburn v. Boston & Lowell R. R. Co.*, *Id.* 283; *City of Portland v. Atlantic & St. Lawrence R. R. Co.*, 66 Me. 485; *Wilson v. City of Watertown*, 3 Hun, 508.



be had for double damages, by reason of the omission to repair on the part of the town, under a law subjecting it to such double damages for such neglect of duty, then the recourse of the town against the company will not be for the entire amount of the recovery, but only for single damages. The liability of the town to double damages being predicated in law upon its own neglect to repair or remove the obstruction, the company will in nowise be liable therefor, such neglect of the town not being in any manner the necessary result of the original negligence or wrong act of the railroad company.<sup>1</sup>

**5. Injuries by leaping from the cars.**—A person traveling on a train which fails to stop at his place of destination, and who leaps from the train in passing such place, under circumstances which should deter a person of ordinary prudence from so doing, does so at his own risk and peril, notwithstanding the conductor or brakeman on the train advise him that he can do so with safety. He is bound to the exercise of reasonable care and judgment in the matter, if left to act voluntarily, and he be not subjected to any actual constraint in reference to leaping from the train.<sup>2</sup>

So, if a passenger is being carried past a station to which he is bound, and at which, by his ticket, and the rules of the road as to the running of the trains, he has a right to be let off, he may not, except at his own risk and peril, get off, or leap from the cars whilst they are moving. He can not, by such rashness, impose any liability upon the company for the consequences thereof. In such case it is his duty to remain on, and he may then have his redress in an action of damages for being carried past the station whereat he had a right to stop. He may, in such case, recover for the inconvenience, lost time, and increased labor and expense of travel, occasioned thereby, as also for all damage which is directly the result of the wrong act or negligence of the company.<sup>3</sup>

<sup>1</sup> *Lowell v. The Boston & Lowell R. R. Co.*, 23 Pick. 24.

<sup>2</sup> *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510; S. C. 5 Am. R. 60; *Dougherty v. Chicago, Burlington & Quincy R. R. Co.*, 86 Ill. 467, 17 Am. Ry. Rep. 489; *Damont v. New Orleans*

& Carrollton R. R. Co., 9 La. Ann. 441; *Evansville & Crawfordsville R. R. Co. v. Duncan*, 28 Ind. 441.

<sup>3</sup> *Damont v. New Orleans & Carrollton R. R. Co.*, 9 La. Ann. 441; *Chicago & Alton R. R. Co. v. Randolph*, 53 Ill. 510; S. C. 5 Am. R. 60.

In like manner, if the stoppage be too short to allow passengers to leave the cars with convenience and safety, they may not, at the risk of the company, attempt to leave the cars whilst starting or in motion. If they do so, they do it at their own risk. They should remain aboard, and resort to their action for damages, occasioned by the negligent or wrong act of the company in not affording a reasonable opportunity or time to leave the train. But although a passenger may not attempt to pass from a moving train, for the mere reason that it is likely to carry him past his station, except at his own peril, if done of his own free will and uninfluenced judgment, yet if the motion of the train be so slow that the danger of getting off may not be apparent to a reasonable, yet inexperienced person, and the manager of the train be present, and instruct and thus influence the party to get off while the train is thus moving, then if the passenger be injured, the injury will not be regarded in law as caused by the contributory negligence of the party injured. He has a right to expect that the company "had employed a skillful and prudent conductor, who would not expose passengers to dangerous risks, and who had experience and knowledge in his business, sufficient to correctly advise and direct passengers as to the proper time and manner of alighting safely from the train."<sup>1</sup>

The same rule prevails in Georgia, as to a passenger leaping from the cars in just apprehension of danger; and such, indeed, is the general rule. If by reason of the action, conduct, or management of the company, his condition be such as would cause a prudent person to leap, as a means of avoiding impending danger, and as more prudent than remaining aboard the train, and in leaping he be injured, the company are liable therefor;<sup>2</sup> and it does not relieve them from such liability that he may have misjudged as to the extent of the danger, or propriety of resorting to such means of its avoidance.<sup>3</sup>

But when a passenger leaps from a car, in which he rightfully is at the time, from a well-founded apprehension of danger, in-

<sup>1</sup> *Lambeth, admr., v. North Carolina R. R. Co.*, 66 N. Car. 494, 499; *Georgia R. R. & B. Co. v. McCurdy*, 45 Georgia, 288; *Bayley v. Eastern R. R. Co.*, 125 Mass. 62; *Bridges v. N. London Ry. Co.*, L. R. 6 Q. B. 377; S. C.

L. R. 7 H. L. 213; *Nicholson v. Lancashire & Y. Ry. Co.*, 3 Hurl. & C. 534.

<sup>2</sup> *South Western R. R. Co. v. Paulk*, 24 Geo. 356.

<sup>3</sup> *Macon & Western R. R. Co. v. Winn*, 26 Geo. 250.

duced by an occurrence which the utmost caution and proper care of the company might have prevented, and the circumstances of apparent danger are such as to reasonably create a well-founded fear of danger to life or member, then if injury be the result of such leaping, the company will be liable therefor: although it be presumable, from ultimate or subsequent developments, that no injury would have resulted to him if he had remained on the cars, and quietly kept his place.<sup>1</sup> If, however, the passenger leap from the cars under such circumstances as should not impress the mind of a prudent man with the necessity of leaping to avoid danger to his life, and is thereby injured, the fact of the conductor being present at the time will not render the company liable, if the conductor be only passive;<sup>2</sup> but if done by order of the conductor, and injury ensue, then the company are liable.<sup>3</sup>

And however imminent the danger, or well-founded the fear may be, if, not induced or occasioned by any wantonly wrong act of the company, one leap from a car in which he has no right to be, and into which he has obtruded himself against the rules of the company, or contrary to his contract for transportation, and is thus injured in leaping, he can not recover for the injury occasioned thereby.<sup>4</sup> Thus, if a passenger, after arriving at his destination, re-enters the train for the purpose of obtaining change from his fare, which the conductor has failed to return to him, and then jumps from the train when in motion, the company does not sustain the position of a carrier as to him.<sup>5</sup>

**6. Injury to married women.**—The husband may, at common

<sup>1</sup> *Stokes v. Saltonstall*, 13 Pet. 181; *Frink v. Potter*, 17 Ill. 406; *Eldridge v. Long Island R. R. Co.*, 1 Sand. 89; *Ingalls v. Bills*, 9 Met. 1. And for an injury received on the platform, whilst attempting to leap from the train, the company are liable, if the circumstances be such as would justify the passenger in leaping or attempting to leap therefrom, by reason of a well-founded fear, or cause for a well-founded fear, of danger: *Buel v. New York Cent. R. R. Co.*, 31 N. Y. (4 Tiffany), 314.

<sup>2</sup> *Lambeth v. N. Car. R. R. Co.*, 66 N. Car. 494.

<sup>3</sup> *Lambeth v. N. Car. R. R. Co.*, 66 N. Car. 494. But see *P., C. & St. L. Ry. Co. v. Krouse*, *post*. In such case, it is a question for the jury whether plaintiff was guilty of negligence: *P., C. & St. L. Ry. Co. v. Krouse*.

<sup>4</sup> *Galena & Chicago Union R. R. Co. v. Yarwood*, 15 Ill. 468.

<sup>5</sup> *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Krouse*, 30 Ohio St. 222, 15 Am. Ry. Rep. 298.

law, maintain an action for personal injuries to his wife, and in his own name, without joining the wife therein; but in such action by himself alone, he can only recover for the loss of service, or rather of assistance, the expense of cure, and the loss of the society of the wife, as occasioned or growing out of such personal injury.<sup>1</sup> But in a suit in the name of both husband and wife, for such injury, recovery may be had for the injury itself, including, also, the pain and mental suffering of the wife occasioned by the injury; not, however, for any of the injuries of the husband, or expenses of cure, as he alone is liable to pay such expenses, and may recover alone therefor in a separate action by himself.<sup>2</sup>

In actions by married women alone, without the husband, for injuries sustained from the negligence of the defendant, or defendant's servants, no recovery can be had for loss of time or service, or inability to labor, unless the woman is transacting business in her own and sole behalf, for her labor, time and service belong to the husband; nor for medical or other attendance, for these are to be furnished by the husband, and are actionable only in his behalf as plaintiff. She can recover only for her suffering and pain.<sup>3</sup>

At common law, an action will not lie at the suit of the husband for the pain and suffering caused by a personal injury to his wife. The action, in such case, is properly brought in the joint names of both husband and wife.<sup>4</sup> Nor does it matter whether the passage money, if the injury be to the wife as a passenger, be paid by the husband or by the wife; in either case, the action for an injury accrues to the wife, as to compensation for suffering and pain, and is rightfully prosecuted in the joint names of the two.<sup>5</sup> But for the loss of service of the wife, and

<sup>1</sup> *McDonald v. The Chi. & N. W. R. R. Co.*, 26 Iowa, 124, 140; *Houston & Great Northern R. R. Co. v. Miller*, 49 Texas, 322; *Cregin v. Brooklyn Cross-town R. R. Co.*, 75 N. Y. 192; S. C. 19 Hun. 341.

<sup>2</sup> *McDonald v. The Chi. & N. W. R. R. Co.*, 26 Iowa, 124, 140; *Fuller and wife v. Naugatuck R. R. Co.*, 21 Conn. 557, 571.

<sup>3</sup> *Filer v. N. Y. Cent. R. R. Co.*, 49

N. Y. 47; S. C. 3 Am. R. W. Rep. 466; *Mewhirter v. Hatten*, 42 Iowa, 288; *Tuttle v. Chicago, Rock Isld. & Pac. R. R. Co.*, 42 Iowa, 518; *Musselman v. Galligher*, 32 Iowa, 383.

<sup>4</sup> *Fuller and wife v. Naugatuck R. R. Co.*, 21 Conn. 557; S. C. 2 Am. R. W. Cas. 161.

<sup>5</sup> *Fuller and wife v. Naugatuck R. R. Co.*, 21 Conn. 557.

deprivation of her society, the husband may sue alone;<sup>1</sup> and also, for the expenses incurred by reason of the injury, as physicians' or surgeons' bills to relieve the injury or effect a cure.<sup>2</sup>

Under the statute of Illinois of Feb. 21, 1861, providing that "all the property, both real and personal, belonging to any married woman as her sole and separate property, or which any woman hereafter married owns at the time of her marriage, or which any married woman, during coverture, acquires, in good faith, from any person other than her husband, by descent, devise, or otherwise, together with all the rents, issues, increase and profits thereof, shall, notwithstanding her marriage, be and remain, during coverture, her sole and separate property, under her sole control, and be held, owned, possessed and enjoyed by her the same as though she was sole and unmarried; and shall not be subject to the disposal, control or interference of her husband, and shall be exempt from execution or attachment for the debts of her husband," the Supreme Court of said state, BREESE, C. J., hold, that the right of suit for an injury to a married woman is property, and that the wife, and not the husband, is the owner thereof, and may sue for or compromise the same.<sup>3</sup>

In Michigan, an action for a personal injury to a married woman may be maintained in her own name alone.<sup>4</sup> And the decisions in that state are to the extent that for personal grievances of the wife the husband can not recover; and so, on the other hand, that in the action by the wife, no recovery can be had for the peculiar damages resulting to the husband by the injury;<sup>5</sup> that their rights are distinct in such cases, and therefore a joint action does not lie in the name of the two.<sup>6</sup>

<sup>1</sup> Fuller and wife v. Naugatuck R. Co., 21 Conn. 557.

<sup>2</sup> Fuller and wife v. Naugatuck R. Co., 21 Conn. 557; S. C. 2 Am. R. W. Cas. 161, 173.

<sup>3</sup> Chi., Burlington & Quincy R. Co. v. Dunt, 52 Ill. 260; S. C. 4 Am. R. 606. In this case the court say: "Who is the natural owner of this right? Not the husband, because the injury did not accrue to him; it was wholly personal to the wife. \* \* \*

\* Indirectly, it is true, the husband was an injured party, also, during her

disabilities, in deprivation of his comfort by reason thereof, and by the further reason of his responsibilities for the charges for her care. For these he can undoubtedly sue and recover such damages as he may prove." 4 Am. R. 609, and 52 Ill. 264, 265.

<sup>4</sup> Berger v. Jacobs, 21 Mich. 215.

<sup>5</sup> Hyatt v. Adams, 16 Mich. 180; Mich. Cent. R. R. Co. v. Coleman, 28 Mich. (6 Post). 440, 442.

<sup>6</sup> Mich. Cent. R. R. Co. v. Coleman, 28 Mich. 442.

In an action for a personal injury to plaintiff's wife, the evidence of medical men is admissible as to the state of her health before and after the injury; as to the permanent nature of the injury; and also, for the purpose of showing the extent of the injury, evidence of her own complaints of personal suffering and pain when first called on, after the injury, and during the examination of her condition by the physicians.<sup>1</sup> So evidence may be given of the value of her services, and of her diminished ability to render the same.<sup>2</sup>

And although the action be in the joint names, as plaintiffs, of the husband and wife, yet the ground of action is the injury to the wife, and the damages or compensation therefor inures to her.<sup>3</sup> And in such an action, the costs of medical treatment incurred by reason of the injuries may be alleged, and be proven, to have been incurred and paid by the husband, for the mere purpose of showing the character and extent of the injury; yet in such joint action no recovery can be had therefor.<sup>4</sup> The right of action, in such case, for deprivation of the comforts, society and service of the wife, and for the medical care and expenses incurred, no doubt vests in the husband, and is a good cause of action; but such action must be in his own name, and not in the joint name of the two.<sup>5</sup> But as to the contract of carriage, if there be no expressed one, then the law implies that the contract is with the wife, if she be traveling on a ticket purchased by her, or for her use by another, even if that other be her husband. The breach of the contract to carry with care is the ground of the action, and the injury is the ground of recovery therein.<sup>6</sup>

**7. The law of the case, in actions for personal injuries.**—In an action to recover damages for a personal injury, the law in force at the time of the infliction of the injury, as to the right of

<sup>1</sup> *Matteson v. New York Cent. R. R. Co.*, 35 N. Y. (8 Tiffany), 487; *Lincoln v. Saratoga & Schenectady R. R. Co.*, 23 Wend. 425; *Murphy v. N. Y. Cent. R. R. Co.*, 66 Barb. 125; *Grand Rapids & Ind. R. R. Co. v. Martin*, 41 Mich. 667; *Kansas Pac. Ry. Co. v. Pointer*, 9 Kansas, 620; *Barber v. Merriam*, 11 Allen, 322; *Fay v. Harlan*, 128 Mass. 244. But see *Ill. Cent. R. R. Co. v. Sutton*, 42 Ill. 438.

<sup>2</sup> *Matteson v. New York Cent. R. R. Co.*, *supra*; *McIntyre, admr., v. N. Y. Cent. R. R. Co.*, 37 N. Y. (10 Tiffany), 287.

<sup>3</sup> *Fuller and wife v. The Naugatuck R. R. Co.*, 21 Conn. 557, 571.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Fuller and wife v. The Naugatuck R. R. Co.*, 21 Conn. 557.

<sup>6</sup> *Fuller v. Naugatuck R. R. Co.*, 21 Conn. 557.

recovery, is the law of the case; and a law subsequently passed, limiting the amount to a fixed sum in such cases, does not apply to injuries inflicted before the enactment of such subsequent law. "The law of the case (say the court, in *Kay v. The Pennsylvania Railroad Company*<sup>1</sup>) at the time when it became complete is an inherent element in it, and if changed or annulled, the right is annulled, justice is denied, and the due course of law violated." And so the law of the country wherein the contract of transportation of a passenger is made, and in which the injury is inflicted, is the law of the case as to the right of action, and therefore, where by that law no action will lie in the courts of such county or state, none will lie thereon in any other state; for though each state will administer the law in form, according to the practice of its own judicial forums, yet where the cause of action relied on occurs abroad, then the rule of law of the state in which it occurs, as to the right to maintain an action, prevails in every other state. Thus where an action was brought in Ohio for an injury incurred on a railroad in the state of New York, a defense, based on a contract to carry the plaintiff free as a passenger, on condition of his incurring all risk of injury from negligence or otherwise, was held to be a bar to the action, as such a contract, though invalid if made in Ohio, is valid by the laws of New York.<sup>2</sup>

It is holden, in some cases of actions against railroad companies for injuries occasioned by the negligence of its servants, that the absence of the servant or servants from the trial, through whose negligence the injury is alleged to have occurred, if such absence be not explained, and there be not full evidence otherwise of the facts of the case, is ground for presumption against the company.<sup>3</sup>

**8. When usages and customs of company may be proven.—**

In an action against a railroad company for an injury alleged to have occurred by reason of the cars not stopping their usual length of time at a station, or long enough to give the passengers a reasonable time in which to leave, the plaintiff may give evidence of the usual and customary period of stopping at that place. It is proper as a means of showing (inferentially at least)

<sup>1</sup> 65 Penn. St. 269, 3 Am. R. 635; 19 Ohio St. 260.

*Menges v. Dentler*, 33 Penn. St. 498.

<sup>3</sup> *Murray v. The South Car. R. R. Co.*, 10 Rich. L. 227.

<sup>2</sup> *Knowlton v. The Erie Ry. Co.*,

what the defendants themselves considered a reasonable time in which to leave the cars.<sup>1</sup> And if the time allowed for such purpose be shorter than usual, on the occasion when the injury was received, this circumstance may tend in some degree to show that a reasonable time for departure was not then allowed.<sup>2</sup>

Customs are often convenient, to which the law gives no coercive force, because they have not been generally acquiesced in, or else, because to do so generally will violate some fundamental principle of law. There are legal tests by which the validity of customs are to be gauged.<sup>3</sup> It must appear that the usage has been general and uniform, and peaceably acquiesced in, and has not been the subject of dispute; it must be certain, and reasonable, and not in contravention of any of the general principles of the law.<sup>4</sup>

**9. Rule and measure of damages.**—Among the ordinary and direct grounds of damages necessarily resulting from injuries to the person, in a suit where the injured person is plaintiff, are bodily and mental suffering and pain; temporary or permanent physical disability; loss of time; and expenses of medical treatment, and of care.<sup>5</sup> These, when they exist, may be proven under the general and common charge of damages; for they are deemed to result directly from the injury inflicted, and therefore may be shown under the common counts or allegations, as they are not of a character to take the defendant by surprise. They may be a direct consequence of the injury.<sup>6</sup> But damages that do not necessarily flow from the principal fact or injury, although possibly attendant thereon, are deemed special; the law does not imply these as the result of the injury. To prevent surprise, they must, if

<sup>1</sup> Fuller and wife *v.* Naugatuck R. R. Co., 21 Conn. 557; S. C. 2 Am. R. W. Cas. 161, 177.

<sup>2</sup> *Ibid.*

<sup>3</sup> Strong *v.* The Grand Trunk R. R. Co., 15 Mich. 206, 220.

<sup>4</sup> Strong *v.* Grand Trunk R. R. Co., 15 Mich. 206, 220; McMillan and another *v.* The Mich. S. & N. Ind. R. R. Co., 16 Mich. 79, 112, 113.

<sup>5</sup> Laing *v.* Colder and another, 8 Penn. St. R. 479; S. C. 2 Am. R. W. Cas. 378; Pennsylvania R. R. Co. *v.* Books, 57 Penn. St. 339; Ohio & Miss.

Ry. Co. *v.* Dickerson, 59 Ind. 317; Klein *v.* Jewett, 11 C. E. Green, 474; Jewett *v.* Klein, 12 *Id.* 550; Morris *v.* Chi., B. & Q. R. R. Co., 45 Ia. 29; South & N. Ala. R. R. Co. *v.* McLendon, 10 Repr. 688; Cohen *v.* Eureka & P. R. R. Co., 14 Nev. 376; Bradshaw *v.* Lancashire & Y. Ry. Co., L. R. 10 C. P. 189; Phillips *v.* London & South Western Ry. Co., L. R. 4 Q. B. Div. 406; S. C. 5 *Id.* 78, and L. R. 5 C. P. Div. 280.

<sup>6</sup> Laing *v.* Colder and another, 8 Penn. St. R. 479.



relied on, be particularly specified and alleged by the plaintiff in his declaration or petition, else he will not be allowed to make proof thereof.<sup>1</sup> Hence, a plaintiff in an action for an injury to the person, inflicted by negligence, was not allowed to prove that others were dependent on him for support, and that, by reason of the injury, he had become embarrassed in his pecuniary circumstances; no damages having been alleged on these grounds in the declaration.<sup>2</sup>

And the effect of the injury upon the mental condition of the plaintiff may be proven to the jury, and considered by them in making up their verdict; also the opinion of medical men as to its influence on the future health of the plaintiff.<sup>3</sup> But a foundation must be laid therefor by suitable allegations in the plaintiff's petition or declaration, whenever the result sought to be proven does not necessarily or naturally flow from the nature of the injury.

Respectable and ordinarily accepted life tables, shown to be such, and to be acted on and consulted by business persons, where applicable in the transaction of their own affairs, may be properly introduced to the jury as evidence in actions for personal injuries, as tending to prove, in connection with the age of the injured person, the probable length or expectancy of life yet remaining to such person; and as a basis, arising therefrom, for the estimating the damages consequent upon the injury, in a pecuniary point of view, having also reference to the degree of inability of the injured person, as to future efforts for a support.<sup>4</sup>

There are authorities to the point that in actions for personal injuries, the pecuniary condition of the defendant may be shown in evidence, when the case is one suitable for vindictive damages, or is brought to redress a malicious tort; but the weight of the authorities and of reason is believed to be to the contrary. If the defendant's ability to pay is to be given in evidence to in-

<sup>1</sup> *Laing v. Colder and another*, 8 Penn. St. R. 479; S. C. 2 Am. R. W. Cas. 378; *Toledo, W. & W. Ry. Co. v. Baddeley*, 54 Ill. 19.

<sup>2</sup> *Laing v. Colder and another*, 8 Penn. St. R. 479; S. C. 2 Am. R. W. Cas. 378. And see Penn. R. R. Co. v. Books, 57 Penn. St. 339, 344; *Baldwin v. Western R. R. Co.*, 4 Gray, 333;

*Tomlinson v. Derby*, 43 Conn. 562; *Hopkins v. Atlantic & St. Lawrence R. R. Co.*, 36 N. H. 9.

<sup>3</sup> *T., W. & W. Ry. Co. v. Baddeley*, 54 Ill. 19; S. C., 5 Am. R. 71; *Wilcox v. Plummer*, 4 Pet. 172.

<sup>4</sup> *McDonald v. The Chicago & N. W. R. R. Co.*, 26 Iowa, 124, 140.

crease the damages, however, in the absence of malicious promptings to the act complained of on his part, then, by the same rule, the plaintiff's pecuniary necessities may in like manner be proven, and such suits would no longer turn exclusively on the merits of the particular case, as to the amount of the damages, nor on questions of injury and compensation, but upon the ability of one party and the wants of the other; and the law and the rights of the parties would become one thing in one case, and another in another, as the relative wealth of the parties may preponderate from time to time in each particular action;<sup>1</sup> and if such rule is to prevail, is the relative test to be applied at the date of committing the act, or as of their circumstances at the time of the trial?

The principle seems to be well settled that, although railroad companies are liable for injuries resulting from the mere negligence, omissions and malfeasance of their agents and servants, occurring in the ordinary course of their employment or agencies, yet such liability is merely to the extent of compensatory damages; and such companies are not liable for the willfully wrong or malicious acts of their agents and servants, done or committed without the approbation or authority of the principals, and not subsequently adopted or approbated by them. To render them liable for exemplary or punitive damages for a willfully wrong act, it is incumbent on the plaintiff to show that the act complained of was done with the authority of the principal, express or implied, or was subsequently adopted by the defendant.<sup>2</sup>

Thus in Rhode Island it has been holden, that in an action of trespass on the case against a railroad company for the wrong or tortious act of an employe or servant, punitive or vindictive

<sup>1</sup> *Hunt v. The Chi. & N. W. R. R. Co.*, 26 Iowa, 363, 374; *Pennsylvania Co. v. Roy*, 102 U. S. 451; S. C. 1 Am. and Eng. R. R. Cas. 225; *Belknap v. Boston & Me. R. R. Co.*, 49 N. H. 358; *Birchard v. Booth*, 4 Wis. 67; *Chicago City Ry. Co. v. Henry*, 62 Ill. 142; *Whitfield v. Westbrook*, 40 Miss. 311. See *Buckley v. Knapp*, 48 Mo. 152.

<sup>2</sup> *Story's Agency*, Sec. 450; *Turner*

*v. North Beach & Mission R. R. Co.*, 1 Withrow's Corp. Cas. 202; S. C. 34 Cal. 594; *Milwaukee & Miss. R. R. Co. v. Finney*, 10 Wis. 388; *Southwick v. Estes*, 7 Cush. 385; *Weed v. Panama R. R. Co.*, 17 N. Y. 362; *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y. 183; *Wright v. Wilcox*, 19 Wend. 343; *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U. S. 489, 6 Am. Ry. Rep. 512.

damages can not be given against the company, unless there is proof to implicate it, and make it "*particeps criminis*" to the agent's act. If from the evidence the principal be involved in the servant's fault in such manner as to amount to a ratification thereof, then whatever damages might be visited otherwise on the servant, may also be visited upon the principal; but not unless, as above stated, the act be in some manner brought home to the defendant itself.<sup>1</sup>

If, however, the willful or malicious act of the agent or servant be committed in the ordinary discharge of the agent or servant's duty, in such a manner as to result in or cause the breach of a contract resting on the company, then for such breach of contract the company will be held liable, notwithstanding the breach thereof was brought about by the malice of the employe; for in such case, the company being bound to perform their undertaking, it is no excuse that the malicious conduct of others, much less of their own servant or agent, has prevented its fulfillment.<sup>2</sup> Thus, where the conductor willfully and maliciously delayed a passenger train, whereby a passenger's contract for transportation was violated on the part of the company, it was held liable for compensatory damages for the breach thereof.<sup>3</sup>

And it is holden in *Beale v. Railway Co.*, in the Circuit Court of the United States for the District of Iowa—Love, Justice—that punitive damages may be given by a jury for injuries occasioned by the gross negligence of a railroad company in employing a drunken engineer, although there seems to have been no evidence of knowledge, on the part of the company, of the dissipation of the engineer. The court say: "A railroad company employs a drunken engineer; the life and personal security of the traveling public is placed in his hands; the public can know nothing of his character, and if an accident occurs, occasioned by his negligence, inattention, or misconduct, and loss of life or limb results, the company should be held responsible for the accident thus occurring; not only in compensatory damages, but in punitive damages for the want of

<sup>1</sup> *Hagan v. The Providence & Worcester R. R. Co.*, 3 Rhod. Isld. 88.

24 N. Y. 183.

<sup>2</sup> *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y. 183.

<sup>3</sup> *Wells v. N. Y. Cent. R. R. Co.*,

the exercise of care in the character of the employes selected.”<sup>1</sup> In this case the court seem to have placed the liability to punitive damages on the want of proper care in the selection of the employe whose misconduct occasioned the injury.

To justify a jury in finding more than mere compensation for a personal injury, they must find from the evidence that there was flagrant misconduct or negligence of the company itself—not such merely of its subordinates. The neglect or mismanagement, to justify punitive damages, must not only be that of the company, as contradistinguished from that of an employe, but must be so gross as to make it necessary for the public good that smart money be imposed by the jury.<sup>2</sup> Otherwise the verdict must be merely compensatory. The damages allowed for must be the natural result of the injury, not conjectural, or from sympathy or prejudice; but are to be present and prospective, so far as they flow naturally and directly from the injury.<sup>3</sup> The jury may consider the effect of the injury upon the plaintiff's health, his limbs, ability to labor or attend to business, expenses of medical attendance, nursing and loss of time; and should also consider his remaining ability to attend to business, by way of aiding to ascertain the extent and permanency of the injury.<sup>4</sup> It is not a question of what one would run the same risk or receive the same injury for; nor is the plaintiff to have the same sum as, at interest, would bring him the amount of his yearly loss which he incurs, for in such case he would not only be made whole by the annual interest for life, but would have the principal over beside.<sup>5</sup> But the true rule is to ascertain from the evidence the annual loss incurred, either permanently or temporarily, from the injury, and allow such sum as would be the value of the sum thus lost, for the residue of plaintiff's lifetime, or for so long a time, if temporary, as the injury, judging from the evidence, will remain. Thus, if the injury amount to one hundred dollars a year, then the question is,

<sup>1</sup> *Beale v. Railway Co.*, 1 Dillon's C. C. R., 568.

<sup>2</sup> *Ackerson v. The Erie Ry. Co.*, 3 Vroom (N. J.), 254; *Edelmann v. St. Louis Transfer Co.*, 3 Mo. App. 503; *Union Pac. R. R. Co. v. Hause*, 1 Wyom. 27; *Kansas Pac. Ry. Co. v.*

*Lundin*, 3 Col. 94.

<sup>3</sup> *Ackerson v. The Erie Ry. Co.*, 3 Vroom (N. J.), 254.

<sup>4</sup> *Ackerson v. The Erie Ry. Co.*, *supra*.

<sup>5</sup> *Ackerson v. The Erie Ry. Co.*, 3 Vroom (N. J.), 254.

what sum, according to the life and annuity tables, and the age and prospects of life of the plaintiff, is the present value of this annual loss to the plaintiff, for and during his prospective lifetime, or such less time as the evidence may require.<sup>1</sup>

In an action brought by a passenger on a railroad against the company, for a personal injury received upon the car during transit, it is not a sufficient plea or defense that the injury was received by the plaintiff whilst he was standing on the platform of the car, outside thereof, while it was moving, "wherefore defendant says that the injury sustained by the plaintiff was the result of his own carelessness, in being in an improper place;"<sup>2</sup> but the plea should also state, and the evidence show, that he was unnecessarily there, of his own carelessness; that the place was one of danger; and that the injury was received, or contributed to, by reason of his said carelessness in being thus in such a dangerous place. His carelessly being there is no defense, unless it contributed to the injury.

**10. Injury incurred from riding out of place.**—A person riding on a railroad train, who is not concerned in operating the same, nor in any manner constrained by the company in his conduct thereon, who of his own free will assumes to leave the car and ride upon an engine, and is injured by an accident occurring whilst thus riding, is guilty of contributory negligence, if it appears that no injury would probably have resulted to him in the car; and being so guilty of want of care on his part, he can not recover, although the accident in which he receives the injury may have occurred by reason of negligence on the part of the railroad company.<sup>3</sup>

So, though riding upon the platform of a moving car is ordi-

<sup>1</sup> *Ackerson v. The Erie Ry. Co.*, 3 Vroom (N. J.), 254.

<sup>2</sup> *Lafayette & Indianapolis R. R. Co. v. Sims*, 27 Ind. 59.

<sup>3</sup> *Doggett v. The Ill. Cent. R. R. Co.*, 34 Iowa, 284. And so as to a passenger riding in the baggage car: *Kentucky Cent. R. R. Co. v. Thomas*, 79 Ky. 160; *S. C. 1 Am. & Eng. R. R. Cas.*, 79; *Pennsylvania R. R. Co. v. Langdon*, 92 Penn. St. 21; *S. C. 1 Am. & Eng. R. R. Cas.* 87. An employe, trav-

eling as a passenger to and from his home, is presumed to have knowledge of a rule against such riding out of place, which is conspicuously posted in the train used by him: *Penn. R. R. Co. v. Langdon*. A conductor can not license passengers to violate such rule: *Ibid.* See this case, also, as to the distinction between regulations established for the convenience of the company, and those for the safety of passengers.

narily negligence in a passenger,<sup>1</sup> yet if there be no room inside the car, and pay is received, or a ticket taken up, for the privilege of occupying such position, and the train stop and take a passenger on under such circumstances, and afford him no inside accommodation, it may amount to an invitation to ride in that place, and an implied assurance that it is a suitable and safe place to occupy, and that he will while there be safely carried. These circumstances are for the consideration of the jury, more especially when connected with a conflict of testimony as to the negligence of the defendant in bringing about the injury.<sup>2</sup>

And where a foreigner, who understood the English language imperfectly, and was also hard of hearing, traveling in the caboose car of a freight train, stepped out on the platform upon the train stopping at a station, and was there injured by a collision, it was held that although he was called to, and resisted an attempt to drag him from the train, he was not guilty of contributory negligence, as it was evident he did not understand the warning, or the purpose of the efforts to save him.<sup>3</sup> It would be for the jury to determine whether, although he saw the approaching train, he had any reason to apprehend a collision.<sup>4</sup> While a train is standing still, a platform is not, *per se*, a dangerous place, and a passenger has a right to presume that due care will be exercised to prevent a collision.<sup>5</sup>

11. **Injury to minor child.**—At common law, a mother has no right of action for injuries, resulting from mere negligence, to her minor child. They do not stand to each other in the relation of mistress and servant. She is not, as is a father, bound for his support.<sup>6</sup> In the language of WOODWARD, C. J.: “A father is bound by law to support and educate his children, and is entitled to the correlative right of service; but a mother not being bound to the duty of maintenance, is not entitled to the correlative right of service.” The relation of mistress and serv-

<sup>1</sup> Clark v. Eighth Avenue R. R. Co., 36 N. Y. (9 Tiffany), 135.

<sup>2</sup> Clark v. Eighth Avenue R. R. Co., 36 N. Y. (9 Tiffany), 135.

<sup>3</sup> Walter v. C., D. & M. R. R. Co., 39 Ia. 33, 9 Am. Ry. Rep. 78.

<sup>4</sup> *Ibid.*

<sup>5</sup> Walter v. C., D. & M. R. R. Co., *supra*.

<sup>6</sup> Fairmount & Arch Street Pass. Railway Co. v. Stutler, 54 Penn. St. 375; The Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's adm'r, 27 Ind. 513.

ant between them can only exist as it does between strangers in blood—that is, by contract, express or implied; except that possibly less evidence might be sufficient to establish it.<sup>1</sup> The action for such injury, if predicated on the loss of service, and the relation of master and servant in law, must be by the father, if living;<sup>2</sup> if the father be not living, and there be no such relation of any one as master by contract, then no such action will lie, for the obvious reason that no one is entitled to, or has lost, the service of the minor. But it does not follow therefrom that no action for the injury will lie. On the contrary, an action will lie in behalf of the minor child thus injured, for not only the pain, suffering, and expense of cure incurred, but also for suitable prospective damages for inability or incapacity occasioned thereby to provide for the necessities and meet the exigencies of life.<sup>3</sup>

Such is the ruling at common law in Pennsylvania. But, in the same state, an action in behalf of the mother is expressly given by statute, when the injury results in the death of the child.<sup>4</sup> The statute act of 26 April, 1855, Purd. 754, declares that the “persons entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the deceased, and no other relative.”<sup>5</sup> This right of action given to the widow includes the right to such compensatory damages as a court and jury, in view of all the circumstances, shall deem reasonable. The measure of damages is to be computed, in a suit by the mother, by the same standard as if in a suit by the father; that is, by the pecuniary loss.<sup>6</sup>

**12. Injury from mob violence.**—A railroad company is not liable in an action, at the suit of a passenger, for injuries received

<sup>1</sup> Fairmount & Arch Street Pass. Railway Co. v. Stutler, 54 Penn. St. 375, 378. But in cases where death results from the injury, an action is given to the mother, or other relatives, by statute, in Pennsylvania: Penn. R. R. Co. v. Bantom, 54 Penn. St. 495; and so in other states: See *ante*, chap. 11.

<sup>2</sup> Fairmount & Arch Street Pass. R. W. Co. v. Stutler, 54 Penn. St. 375.

<sup>3</sup> Fairmount & Arch Street Pass.

R. W. Co. v. Stutler, 54 Penn. St. 375. And this, too, although a recovery be had by the father, as for loss of service, and expenses and cost of nursing and medical attention: *Ibid*.

<sup>4</sup> Pennsylvania R. R. Co. v. Bantom, 54 Penn. St. 495. See Ohio & Miss. R. R. Co. v. Tindall, 13 Ind. 366.

<sup>5</sup> Pennsylvania R. R. Co. v. Bantom, 54 Penn. St. 495.

<sup>6</sup> Pennsylvania R. R. Co. v. Bantom, 54 Penn. St. 495.

by mob violence in the course of his transportation on its cars if without the power of the company to prevent the same. The duties of railroad companies, as carriers, do not include the obligation of providing and carrying a police force or guard, sufficient to suppress mobs who intrude into the cars, nor to suppress disorder and violence amongst the passengers themselves.<sup>1</sup> But it is the duty of the company to maintain order amongst passengers, and to prevent the intrusion of the disorderly upon their passenger trains, as far as within the power of those in control thereof, and to make reasonable efforts so to do; and for omission so to do they may be liable.<sup>2</sup>

**13. Injury to free passengers.**—A passenger going free upon a ticket, the terms of which provide that the passenger “assumes all risk of personal injury, and loss or damage to property whilst using the same on the trains of the company,” is nevertheless entitled to his action for injuries arising out of the negligence of the company, its servants and employes. Such a provision will not protect the corporation from the result of its own wrong act or negligence, if the injured person has himself been free of negligence and want of care in respect to producing or contributing to the injury.<sup>3</sup>

Whether the services of the company in transporting a passenger be gratuitous or be for pay, yet if the company undertake the service, and accept the passenger as such, it is bound to use due and reasonable care in performing the duty thus taken upon itself; and if, by the omission of such care, a passenger receive an injury, he himself being at the same time free from negligence or want of care, the company is liable, and must make compensation therefor.<sup>4</sup>

<sup>1</sup> *Pittsburgh, Fort Wayne & Chi. Ry. Co. v. Hinds*, 53 Penn. St. 512.

<sup>2</sup> *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Hinds*, 53 Penn. St. 512.

<sup>3</sup> *Gillenwater v. Madison & Indianapolis R. R. Co.*, 5 Ind. 339; *Indiana Cent. Ry. Co. v. Mundy*, 21 Ind. 48; *Wells v. N. Y. Central R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. Central R. R. Co.*, 24 N. Y. 196; *Illinois Central R. R. Co. v. Read*, 37 Ill. 484; *Mobile & Ohio R. R. Co. v. Hopkins*,

41 Ala. (N. S.), 486; *Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; *Rose v. Des Moines Valley R. R. Co.*, 39 Ia. 246, 9 Am. Ry. Rep. 7. And such is the general principle as to the necessity of due care on the part of the company; it is due alike to all: *Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18.

<sup>4</sup> *Phila. & Reading R. R. Co. v. Derby*, 14 How. 483; *Steamboat New World v. King*, 16 How. 469; *Todd v.*



The same general rule prevails in Minnesota, as to the care required in regard to free passengers. There is no exemption from liability from the fact of their being carried free, as against the negligence of the company, or of its wanton or wrong acts.<sup>1</sup> It is even held in that state that going into, and being injured in, a baggage car, in the course of a journey, is no defense against the suit of such free passenger, as being contributory negligence on his part;<sup>2</sup> but which, we think, is contrary to the general rule.

But a person riding on the express car, by procurement of the express messenger, and for the purpose of learning the business of express messenger, and who has paid no fare, but is suffered to proceed on the supposition of the conductor that he is an employe in the business of the express company, is not entitled to claim, in case of injury, the benefits, consideration or rights of a passenger, and can not recover against the company for damages sustained, if the company and its servants have committed no wanton act toward such injured person, contributing or causing the injury.<sup>3</sup> And employes riding free upon the road, in consequence of their employment, but not as part consideration for services, are not passengers, although they may not be at the time rendering any service there to the company.<sup>4</sup> But if

Old Colony & Fall River R. R. Co., 3 Allen, 18. But if the stipulation expressly exempt the company from liability for injuries caused by negligence of the servants of the company, in consideration of free passage, then it will be so exempted, except the negligence causing the injury be that of the principal managers of the road themselves, according to a late ruling in New York: *Perkins v. The New York Central R. R. Co.*, 24 N. Y. (10 Smith), 196. And in *Wells v. The New York Central Railroad Company*, 24 N. Y. 181, it is held that a contract to exempt, in case of free passage, the company from "liability under any circumstances, whether of negligence of their agents or otherwise," is not invalid for illegality, and does exempt the company from

injuries caused by negligence; but not from the result of fraud or willful wrongs, such not being the intent of the stipulation, and not allowable if stipulated against.

<sup>1</sup> *Jacobus v. The St. Paul & Chicago Ry. Co.*, 20 Minn. 125.

<sup>2</sup> *Jacobus v. The St. Paul & Chicago Ry. Co.*, 20 Minn. 125.

<sup>3</sup> *Union Pacific Ry. Co. v. Nichols*, 8 Kansas, 505.

<sup>4</sup> *Higgins v. Hann. & St. Joe R. R. Co.*, 36 Mo. 418; *Seaver v. Boston & Maine R. R. Co.*, 14 Gray, 466; *Russell v. Hudson River R. R. Co.*, 17 N. York, 134. See, to the reverse hereof, *Gillenwater v. Madison & Indianapolis R. R. Co.*, 5 Ind. 339; but, as we think, contrary to the current of authority.

riding there in part consideration of labor performed elsewhere, and in going to and from the place of labor, they are passengers, and may recover.<sup>1</sup> And so a person on any part of a train without authority, that is, without a right to be there, is not considered a passenger.<sup>2</sup>

Where a shipper of live stock, or drover, receives a free ticket, to go with his stock and return on a passenger train, with the proviso that he assumes all risk of injury, it has been held that the pass and contract for shipping stock constitutes one contract, and that the holder is not a gratuitous passenger, and the company is liable.<sup>3</sup>

The same rule prevails substantially in Delaware, where it is held that although a drover is being carried free, and has released the right of recovery for injury, being so carried to care for his live stock which is in course of transportation by the company, yet he is a passenger, whether proceeding upon a passenger or stock train; and that though nominally supposed to be carried free, the freight he pays for the carriage of his live stock partakes of the character of a consideration paid for his own carriage, and he is entitled to recover for an injury caused by the negligence of the company, or its servants or employes, unless he himself contribute thereto by his own want of care; and that he is not a co-employe of the company with such other servants or employes.<sup>4</sup>

**14. Injury from thrusting arm out of the window.**—The proper place for passengers, and for their limbs, during transit, is inside the car, and in their seats;<sup>5</sup> and though some authorities

<sup>1</sup>*Fitzpatrick v. New Albany & Salem R. R. Co.*, 7 Ind. (Porter), 436.

<sup>2</sup>*Moss v. Johnson*, 22 Ill. 633.

<sup>3</sup>*Cleveland, Painesville & Ashtabula R. R. Co. v. Curran*, 19 Ohio St. 1; *Penna. R. R. Co. v. Henderson*, 51 Penn. St. 315. See, also, *Smith v. N. Y. Central R. R. Co.*, 24 N. Y. 222; *N. Y. Cent. R. R. Co. v. Lockwood*, 17 Wallace, 357; *Ohio & Mississippi Ry. Co. v. Selby*, 47 Ind. 471, 8 Am. Ry. Rep. 177. A railroad company may limit its liability for the carriage of a passenger upon a drover's free pass, except as to gross or willful negli-

gence: *Boswell v. Hudson River R. R. Co.*, 5 Bosworth (N. Y.), 699; *Bissell v. N. Y. Central R. R. Co.*, 25 N. Y. 442; *Poucher v. N. Y. Central R. R. Co.*, 49 N. Y. 263.

<sup>4</sup>*Flinn v. Phila., Wilm. & Balt. R. R. Co.*, 1 Houston (Del.), 469. But the rule of contributory negligence prevails in Delaware, and if negligence be shown on the part of the plaintiff, it defeats the recovery: *Id.*; *Lynam and wife v. Phila., Wilm. & Balt. R. R. Co.*, 4 Houston, 583.

<sup>5</sup>*Louisville & Nashville R. R. Co. v. Sickings*, 5 Bush (Ky.), 1; *Indianapo-*

hold that it is the duty of railroad companies to so construct windows that passengers can not thrust out or expose their heads, hands or arms,<sup>1</sup> and others hold it the duty of the company to give timely notice to passengers in approaching bridges and other dangerous places, as a condition to exemption from responsibility for injuries there received by exposure of the persons of passengers,<sup>2</sup> yet the more reasonable and better established doctrine is, that passengers who expose their persons or members outside the car windows, do so at their own risk, and are guilty of such negligence in that respect as will, if injured, prevent a recovery for the injury.<sup>3</sup> As to the supposed duty of warning passengers in approaching bridges or other dangerous places, the unreasonableness is apparent from the fact that it would involve an impossibility where there are several cars in a train, as the conductor can not be in all of them at once, and the rapidity of transit is usually such as to prevent his passing from one to another in time to give timely notice of the approach to such places.

Although, by the weight of authority, as well as reason, the principle is well settled that a passenger is bound to keep himself and his limbs within the car, and may not recover if he imprudently thrust his arm out at a window, and thereby receive an injury, yet there are respectable authorities to the effect that this principle is inapplicable to roadways which are so narrow as to endanger projecting limbs;<sup>4</sup> but to our mind this doctrine is tantamount to saying the passenger may extend his limbs outside the cars at the cost of the company, when there is danger, but keep them inside where there is no danger to incur

lis & Cin. R. R. Co. v. Rutherford, 29 Ind. 82; Todd v. Old Colony & Fall River R. R. Co., 3 Allen, 18; Same v. Same, 7 Allen, 207; Pittsburg & Connellville R. R. Co. v. McClurg, 56 Penn. St. 294.

<sup>1</sup> New Jersey R. R. Co. v. Kennard, 21 Penn. St. 203; Indianapolis & Cincinnati R. R. Co. v. Rutherford, 29 Ind. 82.

<sup>2</sup> Laing v. Colder and others, 8 Penn. St. (8 Barr), 479.

<sup>3</sup> Louisville & Nashville R. R. Co.

v. Sickings, 5 Bush (Ky.), 1; Todd v. Old Colony & Fall River R. R. Co., 3 Allen, 18; S. C. 7 Allen, 207; Pittsburg & Connellville R. R. Co. v. Andrews, 39 Md. 329; Same v. McClurg, *supra*. But see Spencer v. Milw. & Prairie du Chien R. R. Co., 17 Wis. 487; Miller v. St. Louis R. R. Co., 5 Mo. App. 471.

<sup>4</sup> New Jersey R. R. Co. v. Kennard, 21 Penn. St. (9 Harris), 203; Chicago & Alton R. R. Co. v. Pondrom, 51 Ill. 333.

by putting them out. These cases are repudiated, as against current authority.<sup>1</sup> The better doctrine is, that a passenger can not recover for an injury received by thrusting his arm out of the window of the car whilst the train is moving, the company not being guilty of any negligence. The Supreme Court of Indiana say that a carrier is not bound to imprison his passengers to insure their safety, and moreover is not bound to bar the windows in such manner as to render it out of the passenger's power to injure himself; that such is the weight of authority, and that the case of *New Jersey R. R. Co. v. Kennard*, 21 Penn. St. 203, to the contrary, is not to be relied on.<sup>2</sup>

In the case cited from 3 Allen, the court say: "Certainly, if it is a want of due care to attempt to leave a car when the train is in motion, although going at a slow rate of speed, as has been heretofore determined by this court, it is no less a want of proper care to ride in a car with an arm or leg exposed to collision against passing trains, or the necessary structures on the sides of the track. Nor was it the province of the jury to determine, as a matter of fact, whether the plaintiff used due and reasonable care, if it was proved that his arm, or a portion of it, was outside of the window at the time of the accident." That court also lay down the rule, in the same case, that if there be no controversy about the fact of such exposure, and that the injury occurred by reason thereof, it is the duty of the court to decide on the legal effect, and to say to the jury that there can be no recovery.<sup>3</sup>

**15. Injury boarding moving train.**—Although it is reckless

<sup>1</sup> *Indianapolis & Cin. R. R. Co. v. Rutherford*, 29 Ind. 82.

<sup>2</sup> *Indianapolis & Cin. R. R. Co. v. Rutherford*, 29 Ind. 82. Such, too, is the doctrine in Massachusetts: *Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18; *Todd v. Old Colony & Fall River R. R. Co.*, 7 Allen, 207.

<sup>3</sup> *Todd v. Old Colony & Fall River R. R. Co.*, 3 Allen, 18, 21, 22; *Lucas v. New Bedford & Taunton R. R. Co.*, 6 Gray, 64; *Gavett v. Manchester & Lawrence R. R. Co.*, 16 Gray, 501; *Gabagan v. Boston & Lowell R. R. Co.*, 1 Allen, 187. In Illinois, however, where the doctrine of comparative

negligence is followed, it is held that where a passenger allows his arm to rest on the base of the window, and slightly projecting outside, and thereby has his arm broken in passing a freight train, the negligence of such person is slight compared with the negligence of the company in permitting its freight cars to stand so near the track of its passenger train; and a recovery may be had for the injury sustained: *Chicago & Alton R. R. Co. v. Pondrom*, 51 Ill. 323. See, also, *Spencer v. Milwaukee & Prairie du Chien R. R. Co.*, 17 Wis. 487.

conduct in a railroad company to slow trains for the purpose of admitting persons on and off, yet for a person to attempt to board a train while moving is negligence, and as such, when contributory to an injury, it will not only preclude a recovery for such injury, but, there being no dispute in regard to the facts, a plaintiff will, for such contributive negligence, be nonsuited.<sup>1</sup>

But it is negligence on the part of the company to bring a train to a stop at the station in such manner as to induce the passengers to believe that it has stopped for their reception, and then, when they are getting aboard, to start again without caution or signal; and this whether the starting were necessary or not, and whether the stop was an actual or only an apparent one. It is the duty of the company, if the passengers are not to enter the cars, to warn them of that fact, and not to start without caution or signal.<sup>2</sup> And an instruction, in such a case, that if the plaintiff acted as persons of common sense and ordinary prudence and intelligence usually act in like cases, there was no such negligence on her part as would prevent a recovery, is not erroneous.<sup>3</sup>

**16. Injury from wrong act of other passenger.**—There is no such privity between a railroad company and a passenger as to make it liable for the wrongful acts of the passenger;<sup>4</sup> but if a railroad conductor improperly receive in the cars a disorderly and dangerous person, knowing him to be such, or finding such therein, omit to expel him therefrom, under his police powers so to do, and injury be committed by such disorderly person upon a passenger, or be brought upon a passenger by his conduct, the company are liable therefor.<sup>5</sup>

<sup>1</sup> *Phillips v. The Rensselaer & Saratoga R. R. Co.*, 49 N. Y. (4 Sickels) 177, 180, 182; *Knight v. Pontchartrain R. R. Co.*, 23 La. An. 462; *Hubner v. New Orleans & Carrollton R. R. Co.*, 23 La. An. 492; *Harvey v. Eastern R. R. Co.*, 116 Mass. 269, 7 Am. Ry. Rep. 463; *Lake Shore & Mich. Southern Ry. Co. v. Roy*, 5 Bradw. (Ill.), 82; *Galveston, H. & S. A. R. R. Co. v. LeGierse*, 51 Tex. 189; *Nelson v. Atlantic & Pac. R. R. Co.*, 68 Mo. 593; *Richmond & Danville R. R. Co.*

*v. Morris*, 31 Gratt. 200.

<sup>2</sup> *Curtis v. Detroit & Milwaukee R. R. Co.*, 27 Wis. 158, 5 Am. Ry. Rep. 368.

<sup>3</sup> *Curtis v. Detroit & Mil. R. R. Co.*, *supra*.

<sup>4</sup> *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Hinds*, 53 Penn. St. 512; *Putnam v. Broadway & Seventh Avenue R. R. Co.*, 55 N. Y. (10 Sickels), 108, 113.

<sup>5</sup> *Putnam v. Broadway & Seventh Avenue R. R. Co.*, 55 N. Y. 108, 113;

17. **Injury to passenger engaged with company in common illegal purpose.**—Persons engaged in a common purpose which is illegal or criminal, are, in respect to such illegality or criminal intent, *in pari delictu*; and, therefore, if one incur an injury from the negligence of another, each being engaged in such illegal project or purpose, no action will lie for the injury. Hence, if an organized but unarmed body of men enter and travel upon a railroad train with intent to join in an illegal act or rebellion against their government, and the railroad company carry them at the credited expense of those claiming to wage a war upon the government, but which is in fact a mere rebellion, and one of such passengers be injured by the negligence of the railroad company, no action for the injury will be sustained.<sup>1</sup> But if the company compel one or more of them to pay their fare, and such fare paying ones be injured by the negligence of the company, then an action will lie for the injury, forasmuch as, in respect to such person or persons, the carrying is not an illegal act.<sup>2</sup>

Where the injured person, or person suffering the loss, and the railroad company, are mutually engaged in the prosecution of an unlawful purpose or enterprise, as, for instance, where the owner of a slave, who is traveling with him as his servant, is one of a military company of persons in rebellion against the government, and the railroad company is running its train in the same interest—the parties are, in respect to the injury, *in pari delictu*, and there can be no recovery for the loss of the slave, if killed upon or by the train in the prosecution of such common enterprise.<sup>3</sup> But if the circumstances as to the status of the parties is such that a right of action and recovery accrues to the owner of the slave, then although the slave be regarded in law, for some purposes, as property, yet the carrier thereof does not, in respect to such slave, become an insurer, as is the case in regard to ordinary goods and chattels; but the person of the slave is regarded, whilst in course of transportation, more in the character of a

New Orleans, St. Louis & Chicago R. R. Co. v. Burke, 53 Miss. 200, 9 Am. Ry. Rep. 308.

<sup>1</sup> Redd v. The Muscogee R. R. Co., 48 Geo. 102.

<sup>2</sup> Redd v. The Muscogee R. R. Co., 48 Geo. 102.

<sup>3</sup> Wallace v. Cannon, 38 Geo. 199; Muscogee R. R. Co. v. Redd, 54 Geo. 33; and same case, 48 Geo. 102.

passenger, and liability for injury to him is to be tested rather by the rules that apply to injuries to passengers.<sup>1</sup>

In disposing of the question of negligence in such case, the starting of the train by which the injury is caused, at an unusual speed, and without the ordinary signal, may be considered, if, from the manner of the injury, it be material.<sup>2</sup>

**18. Injury from joint negligence of two companies.**—For an injury received on a train of a company using a railroad in common with another company, the passenger has his remedy against the company upon whose train he was injured, he being a passenger thereon at the time, although the injury is the result of the joint negligence of the two different companies, in so running or stopping of trains as to cause a collision, resulting in the injury.<sup>3</sup> In the language of COLT, J., "it is no answer to an action by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury."<sup>4</sup>

If the companies are partners in the profits of the road, or are jointly guilty of negligence, they are both liable.<sup>5</sup>

**19. Injury to passengers on freight trains.**—Where none of a company's freight trains have been or are used for carrying passengers, and the passenger carriage has been confined exclusively to the passenger trains proper, then a person thrusting himself upon a freight train is there as an intruder, and can not claim the rights of a passenger.<sup>6</sup> If he be injured thereon, he can not recover as against the company, unless the injury be wantonly caused by it, or by its employes in the course of their employment toward such person.<sup>7</sup> But when freight trains, or some of them, are accustomed to carry

<sup>1</sup> *Mitchell v. Western & Atlantic R. R. Co.*, 30 Geo. 22; *Muscogee R. R. Co. v. Redd*, 54 Geo. 33; Same case, 48 Geo. 102.

<sup>2</sup> *Mitchell v. Western & Atlantic R. R. Co.*, 30 Geo. 22.

<sup>3</sup> *Eaton v. The Boston & Lowell R. R. Co.*, 11 Allen, 500; *Sheridan v. Brooklyn City & N. R. R. Co.*, 36 N. Y. 39; *Webster v. Hudson River R. R. Co.*, 38 N. Y. 260; *Slater v. Mersereau*, 64 N. Y. 147.

<sup>4</sup> *Eaton v. The Boston & Lowell R. R. Co.*, 11 Allen, 500, 505.

<sup>5</sup> *Foulkes v. Metropolitan Dist. Ry. Co.*, Law. Rep. 5 C. P. Div. 157; S. C. 4 *Id.* 267; *Peters v. Rylands*, 20 Penn. St. 497; *Barter v. Wheeler*, 49 N. H. 9; *Vary v. Burlington, Cedar Rapids & Mo. River R. R. Co.*, 42 Ia. 246.

<sup>6</sup> *Lucas v. Milwaukee & St. Paul R. W. Co.*, 33 Wis. 41; *Eaton v. Delaware, Lackawanna & Western R. R. Co.*, 57 N. Y. 382, 7 Am. Ry. Rep. 67.

<sup>7</sup> *Lucas v. Milwaukee & St. Paul R. W. Co.*, 33 Wis. 41.

passengers for pay, and a passenger enters a freight train to be carried for pay, though he may have no ticket, and though the course of such train as to carrying passengers may, as between the employes thereon and the company, be such that passengers are not allowed thereon, yet such person, if ignorant thereof, is entitled to be regarded as a passenger, and if injured without fault on his part, and by the negligence of the company or its employes, the company is liable therefor.<sup>1</sup> But the right to be so regarded as a passenger in such case, is as a passenger upon a freight and caboose train, with such comforts as the same affords, run and handled as such trains are ordinarily handled, and not to the comforts of passenger trains.<sup>2</sup> The fact that a passenger is invited to ride by the conductor makes no difference; for the conductor is not invested with authority for such purpose.<sup>3</sup>

**20. Injury inflicted on cars drawn for another company.**—A railroad company is a carrier of passengers, within all the meaning and responsibilities of the term, when carried over its own road in the car of another company, which, by an arrangement with such other company, it receives and draws over its own road with the passengers therein. It is, by its own servants and conductors, in full control of such car; and the control and agency of the other road and company from whom it is thus received, is, under such circumstances, wholly withdrawn.<sup>4</sup> Therefore, in case of personal injury to a passenger in a car thus drawn for another company, under such circumstances as would render the company liable if incurred upon a car of its own, it will be in like manner responsible.<sup>5</sup>

**21. Pleadings in actions for personal injury.**—With a proper foundation therefor in his petition or declaration, the plaintiff may show by proof the nature and extent of his injuries, his sufferings, length of time for which he was disabled, his expenses of being cured, his condition in respect to the injuries at the time of the trial, and the prospective condition of them in the future; the latter of which may be shown by the evidence of his

<sup>1</sup> Lucas v. Milwaukee & St. Paul R. W. Co., 33 Wis. 41. *supra*.

<sup>2</sup> Lucas v. M. & St. P. Ry. Co., *supra*.

<sup>3</sup> Eaton v. Del., L. & W. R. R. Co.,

<sup>4</sup> Schopman v. The Boston & Worcester R. R. Co., 9 Cush. 24.

<sup>5</sup> *Ibid*.



medical attendant and other medical experts.<sup>1</sup> But the pecuniary or social condition of the plaintiff, and whether rich or poor, married or single, can not be given in evidence to the jury; neither of these can shed any light on the nature of the injuries, or in any way show how much the plaintiff is damaged, or in any way enhance or diminish the amount he is entitled to recover.<sup>2</sup>

In an action for a personal injury in Massachusetts, the plaintiff may set forth several distinct causes of action in several distinct counts in his declaration or petition; and so he may set forth one and the same cause, in different manner and language, in several distinct counts, so varied as to more probably, in some one of them, meet the particulars of the proof expected to be given on the part of the plaintiff.<sup>3</sup> The wrongful getting onto a street car by a party having no ticket and no right there, if allowed for a time to remain, will not then justify his forcible expulsion under dangerous circumstances; and if it be done, and injury results from it, the company will be liable.<sup>4</sup>

A count alleging that plaintiff was in the car of defendants, and was thrown therefrom by the carelessness of defendants, is too general.<sup>5</sup>

**22. Liability of owner company for injuries inflicted by another company using road.**—A corporation owning a railroad, and permitting other persons or companies to run engines over and use the same, is liable, by the rulings in Georgia, for injuries inflicted by the latter, when such injuries are otherwise of a character to sustain an action. The law will not absolve the owners from their charter obligations, and subrogate in their stead others not authorized by law to assume the same.<sup>6</sup> The

<sup>1</sup> *Kansas Pacific Ry. Co. v. Pointer*, 9 Kansas, 620.

<sup>2</sup> *Kansas Pacific Ry. Co. v. Pointer*, 9 Kansas, 620, 629.

<sup>3</sup> *Lovett v. Salem & South Danvers R. R. Co.*, 9 Allen, 557. A city ordinance restricting the rate of speed of railroad trains is admissible in evidence, if alleged in the complaint. A copy need not be filed with the complaint: *Madison & Indianapolis R. R. Co. v. Taffe*, 37 Ind. 361, 5 Am. Ry. Rep. 422.

<sup>4</sup> *Lovett v. Salem & South Danvers*

*R. R. Co.*, 9 Allen, 557; *Norris v. Litchfield*, 35 N. H. 271; *Kerwhacker v. Cleveland, C. & C. R. R. Co.*, 3 Ohio St. (N. S.), 172; *Penn. Co. v. Sinclair*, 62 Ind. 301; *Rounds v. Del., Lackawanna & Western R. R. Co.*, 64 N. Y. 129; *S. C. 3 Hun*, 329, and 5 *Thomp. & C.* 475; *McCarty v. Del. & Hudson Canal Co.*, 17 Hun, 74.

<sup>5</sup> *Central R. R. Co. of N. J. v. Van Horn*, 38 N. J. 133, 13 Am. Ry. Rep. 36.

<sup>6</sup> *Macon & Augusta R. R. Co. v. Mayes*, 49 Geo. 355; *Abbott v. Johns-*

case here cited from Georgia was not one in which the company inflicting the injury were lessees of the road, but a case in which the contractors in the construction thereof were suffered to run trains over the same, and the injury was caused by one of their trains. The court, in their opinion, cite *Railroad Co. v. Winans*, 17 How. 39, to the point that the owners can not absolve themselves from liability, or from performance of obligations, "without the consent of the legislature." We therefore infer that the rule laid down in Georgia in the case here treated of, would not, in the courts of said states, be applied to cases of injuries caused by lessees of a road, if leased by statutory allowance or permission.

In the subsequent case of *Central R. R. & Banking Co. v. Perry*, in the same court,<sup>1</sup> which, the court say, is unlike the preceding case, it is said that in such case each company must protect its own passengers against injury by the other, provided the passenger is in his proper place; but if the passenger, by reason of his want of promptitude in taking the train, is obliged to pursue it upon the track, the company whose passenger he is, is not liable for the negligence of the other company.

But the rule of liability for negligence which attaches to a carrier by rail who runs a passenger car upon a railroad of the state, propelled by the motive power belonging to the state, is the same as if the service were being rendered upon a road of the carrier's own. The negligence of those concerned in running the engine or conducting the train, though employed by the agents of the state, is nevertheless his negligence, and he is responsible therefor, as if the servants were his.<sup>2</sup>

**23. Injuries received in getting off of moving train.**—If passengers attempt to get off from a moving train, for the mere circumstance that they are about to be carried by, it is such great negligence and want of care that no recovery can be had for injuries received while making the attempt. If the train does not stop at the place of their destination, or stopping there, does not give sufficient time for their leaving before proceeding, the passengers should remain in the cars, and resort to their

town, *Gloversville & K. Horse R. R. Co.*, 80 N. Y. 27; S. C. 21 Alb. Law Jour. 193.

<sup>1</sup> 58 Ga. 461, 16 Am. Ry. Rep. 122.

<sup>2</sup> *Peters v. Rylands*, 20 Penn. St. (8 Harris), 497; *McElroy v. Nashua & Lowell R. R. Co.*, 4 Cush. 400.

action for being carried by their station. They can not remedy the error by assuming to leave the moving train, except when impelled by reasonable fear of danger; and if they do so, and are injured, it is their own gross fault, and they can not recover.<sup>1</sup>

And in a case where a passenger (a woman) was directed to get off while the cars were in motion, but the evidence was conflicting as to whether the direction was given by a brakeman or one not employed by the company, it is for the jury to say, even then, whether it was prudent for her to attempt to get off; and an instruction that it is immaterial who gave the direction, is erroneous.<sup>2</sup> But the court say in that case, that if such direction were given by an employe of the company, the plaintiff might assume it was safe to alight; but not if given by another passenger.<sup>3</sup>

It may be negligence, according to circumstances, for a railroad train to stop short of the station in the night time;<sup>4</sup> and the negligence of the plaintiff, in getting off the train at such a time and place, must contribute directly to the injury.<sup>5</sup>

**24. Injury to passenger who is improperly off the train.**—A railroad corporation is not responsible to a passenger for a personal injury received while off the cars at a way station, other than the one to which he is bound. His place is on the train, and if he leaves it while it stops, of his own will, without inducements from the company, its servants or agents, so to do, and is injured without the fault of the company, he can not recover.<sup>6</sup>

<sup>1</sup> *Blodgett v. Bartlett*, 50 Geo. 353; *Damont v. New Orleans & Carrollton R. R. Co.*, 9 La. An. 441; *Penn. R. R. Co. v. Aspell*, 23 Penn. St. 147; *Ill. Central R. R. Co. v. Able*, 59 Ill. 131; *Gavett v. Manchester & Lawrence R. R. Co.*, 16 Gray, 501; *Jeffersonville R. R. Co. v. Hendricks*, admr., 26 Ind. 228; *Same v. Swift*, *Id.* 459; *Atchison & Neb. R. R. Co. v. Flinn*, 24 Kans. 627; *S. C. 1 Am. & Eng. R. R. Cas.* 240. But the rule seems to be otherwise in Missouri. So held, however, in a case where a mother was about to be separated from her child by the train moving away: *Loyd v. Hannibal & St. Joseph R. R. Co.*,

53 Mo. 509, 12 Am. Ry. Rep. 474.

<sup>2</sup> *Filer v. New York Central R. R. Co.*, 59 N. Y. 351, 7 Am. Ry. Rep. 111.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Central R. R. Co. of N. J. v. VanHorn*, 38 N. J. 133, 13 Am. Ry. Rep. 36. But see *Rose v. Northeastern Ry. Co.*, Law Rep., 2 Exch. Div. 248, 19 Am. Ry. Rep. 466.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Frost v. Grand Trunk R. R. Co.*, 10 Allen, 387. See, also, *State v. Grand Trunk Ry. Co.*, 58 Maine, 176. But see, *contra*, *Jeffersonville, Madison & Indianapolis R. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325;

But a person having a ticket, and being present at the depot to take the train, is a passenger, though he has not entered the cars,<sup>1</sup> and the company is bound to use extraordinary diligence to secure his safety, and ordinary diligence for his convenience or accommodation;<sup>2</sup> but they are not bound to such extraordinary diligence in adopting precautions to prevent passengers from being left by the train, if a full opportunity is afforded the passenger to take his place, and he is unnecessarily late in so doing.<sup>3</sup> Ordinary diligence in this respect must be exercised by both, and it is a question for the jury whether signals given for this purpose are sufficient,<sup>4</sup> and, also, whether under the circumstances a passenger might pursue a moving train to get on.<sup>5</sup>

**25. Injuries inflicted carrying passengers outside of charter authority.**—If a railroad company engage in undertakings to carry passengers outside of their charter authority, or by a different conveyance or line of conveyance than that of their railroad, the corporation is liable as common carrier for injuries thereon, and can not set up that circumstance in defense of actions for such injuries;<sup>6</sup> for whether the undertaking be *ultra vires* or not, the company are liable for the result of the negligence.<sup>7</sup>

**26. Injury to servant or apprentice.**—Doubtless the same rules of recovery apply to the case of an injury of a servant or apprentice, as to other civil actions of tort which are allowed to the master.<sup>8</sup> The adjudicated cases on this head are few, however. It is held in a late case that the relation of master and

Keokuk Northern Line Packet Co. v. True, 88 Ill. 608, 21 Am. Ry. Rep. 371. In the latter case, the question was as to the reasonableness of a rule requiring passengers to remain upon a boat at stopping places. It was held not reasonable.

<sup>1</sup> Central R. R. & Banking Co. v. Perry, 58 Ga. 461, 16 Am. Ry. Rep. 122.

<sup>2</sup> Central R. R. & B. Co. v. Perry.

<sup>3</sup> Central R. R. & B. Co. v. Perry.

<sup>4</sup> Central R. R. & B. Co. v. Perry.

<sup>5</sup> *Ibid.*

<sup>6</sup> Hart v. The Rensselaer & Sarato-

ga R. R. Co., 8 N. Y. (4 Selden), 37; Buffett v. The Troy & Boston R. R. Co., 40 N. Y. (1 Hand), 168; Ohio & Miss. Ry. Co. v. McCarthy, 96 U. S. 258; Grover & Baker S. M. Co. v. Mo. Pac. Ry. Co., 70 Mo. 672.

<sup>7</sup> Hart v. The Rensselaer & Saratoga R. R. Co., 8 N. Y. (4 Selden), 37; Bissell v. Mich. S. & N. Ind. R. R. Co., 22 N. Y. 258; Buffett v. The Troy & Boston R. R. Co., 40 N. Y. (1 Hand), 168; Cary v. The Cleveland & Toledo R. R. Co., 29 Barb. 35.

<sup>8</sup> Ames v. Union Ry. Co., 117 Mass. 541, 6 Am. Ry. Rep. 260.

apprentice will sustain an action in the name of the master for injury to the apprentice, on the ground of loss of service.<sup>1</sup>

**27. Injuries while traveling on Sunday.**—By violating a statute prohibiting traveling on Sunday, a traveler does not thereby put himself outside the protection of the law; and a carrier upon whose conveyance he takes passage, is not thereby relieved from his ordinary obligations to take every precaution for his safety.<sup>2</sup> And this obligation is independent of any contract, and exists where no contract for transportation has been made.<sup>3</sup> But plaintiff is entitled to have the question whether he was traveling on matters of “necessity or charity,” tried by a jury.<sup>4</sup>

<sup>1</sup> Ames v. Union Ry. Co., *supra*.

<sup>2</sup> Carroll v. Staten Island R. R. Co.,  
58 N. Y. 126, 7 Am. Ry. Rep. 25.

<sup>3</sup> Carroll v. Staten Island R. R. Co.,

*supra*.

<sup>4</sup> Doyle v. Lynn & Boston R. R. Co.,  
118 Mass. 195, 9 Am. Ry. Rep. 277.

## CHAPTER LIII.

### PERSONAL INJURY TO OTHERS THAN PASSENGERS OR EMPLOYES.

	Section.		Section.
Duties and liabilities of railroad companies to the public generally . . . . .	1	Injuries to persons crossing the track at crossings . . . .	4
Injuries resulting from careless using or keeping dangerous structures . . . . .	2	Injuries received passing under the cars . . . . .	5
Injuries to persons upon railroad track . . . . .	3	Injuries to persons accompanying passengers to cars . . . .	6
		Injuries to persons at station . .	7

**1. Duties and liabilities to the public generally.**—There is a certain degree of care due to the public at large from those using or having dangerous articles, machinery and structures, not merely in the manner of their use, but also in the keeping thereof, the non-observance of which, if injury result therefrom, will render them responsible for such injuries, if they occur without fault or negligence, contributory thereto, on the part of the injured persons.<sup>1</sup> Thus where a railway company, whose duty it was to keep their road bed in good order, in the street of a city, suffered the same to be out of repair, by reason of which an injury occurred to a person, it was held that the cause of the injury was proximate, and the company were liable, if the injured party was not guilty of negligence.<sup>2</sup>

<sup>1</sup> *Hayden v. The Smithville Manuf. Co.*, 29 Conn. 548; *Rauch v. Lloyd & Hill*, 31 Penn. St. (7 Casey), 358; *Oakland R. W. Co. v. Fielding*, 48 Penn. St. (12 Wright), 320; *Ill. Cent. R. R. Co. v. Phillips*, 49 Ill. 234; *State, use, etc., v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 47 Md. 76, 18 Am. Ry. Rep. 253; *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207, 19 Am. Ry. Rep. 231; *Pittsburgh, Fort Wayne & Chi. Ry. Co. v. Bing-*

*ham*, 29 Ohio St. 364; *Quimby v. Boston & Me. R. R. Co.*, 69 Me. 340; *Woburn v. Boston & Lowell R. R. Co.*, 109 Mass. 283; *Mellen v. Morrill*, 126 Mass. 545; *Nickerson v. Tirrell*, 127 Mass. 236; *Grand Rapids & Ind. R. R. Co. v. Martin*, 41 Mich. 667.

<sup>2</sup> *Oakland R. W. Co. v. Fielding*, 48 Penn. St. 320; *Veazie v. Penobscot R. R. Co.*, 49 Me. 119; *Burritt v. City of New Haven*, 42 Conn. 174; *Gale v. N. Y. Cent. & H. R. R. R. Co.*, 76 N. Y.

Where one, though not a passenger, is injured by a railroad train, the laws of humanity require those in charge to so far care for the injured person as to place him, if practicable, in a safe place, where he may be cared for.<sup>1</sup> And though the injured person be apparently dead, if negligently removed to a place whereat, on reviving, he dies for impossibility of being cared for—as, for instance, where the supposed corpse was locked up over night in a warehouse, and reviving during the night, died from loss of blood by a ruptured artery—it is held that however innocent the company had been as to the original injury, that culpability arose from such subsequent conduct of the employes, and that they were so far the company's agents in that respect as to hold the latter liable for their conduct.<sup>2</sup>

**2. Injuries resulting from careless using or keeping dangerous structures.**—Thus it is held that a railroad company using a turn-table in a town or village, or other populous place, unsecured and unguarded, may in that respect be guilty of such negligence as will render the company liable for injuries occasioned thereby to an infant of such tender years as to be incapable of using ordinary care, or of discriminating between danger and safety, who intrudes upon the same and is injured thereby, although it be upon the private grounds of the company, such premises at the same time being unenclosed and unguarded.<sup>3</sup>

594; S. C. 13 Hun, 1; *Lyon v. St. Louis, Iron Mountain & Southern R. R. Co.*, 6 Mo. App. 516. A corporation which is both a railroad and a mining company can not be made liable, under a statute, as the proprietor of a railroad, for injuries inflicted in its mining operations: *Claxton v. Lexington & Big Sandy R. R. Co.*, 13 Bush, 636, 17 Am. Ry. Rep. 12.

<sup>1</sup> *Northern Cent. R. W. Co. v. The State*, for use, etc., 29 Md. 420; *Balt. & Ohio R. R. Co. v. State*, 41 Md. 268.

<sup>2</sup> *Northern Cent. R. W. Co. v. The State*, for use, etc., 29 Md. 420, 441. In this case the court say: "To contend that the agents were not acting in the course of their employment in so removing and disposing of the party, is to contend that the duty of the defend-

ant extended no farther than to have cast off by the wayside the helpless and apparently dead man, without taking care to ascertain whether he was dead or alive, or if alive, whether his life could be saved by reasonable assistance, timely rendered. For such a rule of restricted responsibility no authority has been produced, and we apprehend none can be found. On the contrary, it is the settled policy of the law, 'to give such agents and servants a large and liberal discretion, and hold the companies liable for all their acts, within the most extensive range of their charter powers.' 1 Red. on Railw. 510; *Phila. & Read. Railway Co. v. Derby*, 14 How. 468, 483."

<sup>3</sup> *Stout v. The Sioux City & Pacific R. R. Co.*, 2 Dillon's C. C. R. 294;

And they are held to the same liability by leaving an excavation in the street unguarded.<sup>1</sup>

**3. Injuries to persons on the track.**—At places other than crossings, or in public highways, a railroad track is the private property of the company, and no one other than the company's servants or employes, in the necessary discharge of duties there, have any right to be thereon; and more especially so as to their using the same as a thoroughfare or pathway, on which to walk or travel.<sup>2</sup> And though the company may not wantonly injure persons thus intruding upon and using the same,<sup>3</sup> yet if the person be an adult, not known to those in charge of the train to be deficient in discretion, or in physical ability to take care of himself, or not known to be deficient in his faculty of hearing, and not in any way presenting indications of being disabled, or incapable of taking care for his safety, then the persons in charge of the train have a right to conclude, and to act on that conclusion, that such person is in possession of all his proper faculties to enable him to do so, and will leave the track in time to save himself from injury, and are not bound to stop or check up the

*Sioux City & Pac. R. R. Co. v. Stout*, 17 Wall. 657; *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207, 19 Am. Ry. Rep. 231; *Koons v. St. Louis & Iron Mountain R. R. Co.*, 65 Mo. 592; *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332. It is otherwise, however, where the turn-table is isolated: *St. Louis, Vandalia & Terre Haute R. R. Co. v. Bell*, 81 Ill. 76.

<sup>1</sup> *Hagan's Case*, 5 Dill. 96.

<sup>2</sup> *Finlayson v. The C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579; *Phil. & Reading R. R. Co. v. Hummell*, 44 Penn. St. 375; *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Collins*, 87 Penn. St. 405; *Patterson v. Phila., Wil. & Balt. R. R. Co.*, 4 Houst. (Del.), 103; S. C. 7 Am. Ry. Rep. 207; *Isabel v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 475, 9 Am. Ry. Rep. 261; *Hazen v. Boston & Maine R. R. Co.*, 2 Gray, 574. 580; *Metallic Comp. Casting Co. v. Fitchburg R. R. Co.*, 109 Mass. 277; *Sweeney v. Boston & Albany R.*

*R. Co.*, 128 *Id.* 5; S. C. 1 Am. & Eng. R. R. Cas. 138; Ill. Cent. R. R. Co. v. Hetherington, 83 Ill. 510; *McCarty v. Del. & Hudson Canal Co.*, 17 Hun, 74; *Kansas Pac. Ry. Co. v. Ward*, 4 Col. 30. But see, as to a child at a station: *Hicks v. Pacific R. R. Co.*, 64 Mo. 430, 17 Am. Ry. Rep. 273; *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33.

<sup>3</sup> *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579; *Patterson v. Phila., Wil. & Balt. R. R. Co.*, 4 Houst. (Del.), 103; S. C. 7 Am. Ry. Rep. 207; *Isabel v. H. & St. J. R. R. Co.*, *supra*; *Donaldson v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 293, 20 Am. Ry. Rep. 15; *Penn. Co. v. Sinclair*, 62 Ind. 301; *Rounds v. Del., Lack. & West'n R. R. Co.*, 64 N. Y. 129, 3 Hun, 329, 5 Thomp. & C. 475; *McCarty v. Del. & Hudson Canal Co.*, 17 Hun, 74; *Johnson v. Boston & Me. R. R. Co.*, 125 Mass. 75; *Morrissey v. Eastern R. R. Co.*, 126 *Id.* 377.



train on his account;<sup>1</sup> but as a matter of ordinary prudence and care, it is their duty to sound the whistle and ring the bell, as a warning of the approaching danger.<sup>2</sup>

Yet under ordinary circumstances there is no obligation resting upon the company to stop or check up their train in approaching a person thus intruding and walking along upon its track.<sup>3</sup> As exceptions to this rule, however, if the person be an infant of tender years, or a person known to those in charge of the train to be deaf, helpless, or infirm in body or mind, or is found to be prostrate on the track, we may add, so as to present

<sup>1</sup> *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579; *Indianapolis & V. R. R. Co. v. McClaren*, 62 Ind. 566; *Toledo, Wabash & Western Ry. Co. v. Jones*, 76 Ill. 311; *Chicago, Burlington & Quincy R. R. Co. v. Damerell*, 81 Ill. 450; *Mobile & M. Ry. Co. v. Blakely*, 59 Ala. 471; *Tanner v. Louisville & Nashville R. R. Co.*, 60 Ala. 621; *Cogswell v. Oregon & Cal. R. R. Co.*, 6 Ore. 417.

<sup>2</sup> *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579. But see *Harlan v. St. Louis, Kansas City & Northern R. R. Co.*, 64 Mo. 480, 17 Am. Ry. Rep. 300. In Tennessee, by statute, railroad companies are required in such case to sound the whistle, and use every possible means to stop the train and prevent the accident, and for failure to do so they are absolutely liable: *Louisville & Nashville R. R. Co. v. Connor*, 9 Heisk. 19, 19 Am. Ry. Rep. 368; *Hill v. Louisville & Nashville R. R. Co.*, 9 Heisk. 823, 19 Am. Ry. Rep. 400; *Louisville & Nashville R. R. Co. v. Robertson*, 9 Heisk. 276, 20 Am. Ry. Rep. 9. By section 1169 of the code, the burden of proof is expressly put upon the company to prove its compliance with the requirements of the statute, and necessarily that it has requisite means to be thus employed, and to show that its road, machinery and equipments are in good order, and conform to the present state

of the art: *L. & N. R. R. Co. v. Connor*, *supra*. An instruction as to such duty which is no broader than the statute, is good: *Ibid*. A slight increase of danger to passengers is no excuse for not complying with the statute; nor, if it were, would employes be permitted to give their mere opinion to that effect, without clearly showing the nature and extent of the danger incurred: *Ibid*. The statute must be strictly obeyed, whether it seems necessary or proper to the court or the company, or not: *Ibid*.; *Hill v. L. & N. R. R. Co.*, *supra*. And even if the jury find that the accident would have happened had the statutory precautions been observed, it will not excuse the defendant: *L. & N. R. R. Co. v. Connor*, *supra*. And if the plaintiff's intestate were drunk, still the defendant is liable, if the whistle was not blown: *Hill v. L. & N. R. R. Co.*, *supra*. This statute does not apply as between the company and its employes about their yards and stations: *Louisville & Nashville R. R. Co. v. Robertson*, 9 Heisk. 276, 20 Am. Ry. Rep. 9.

<sup>3</sup> *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579; *Phil. & Reading R. R. Co. v. Hummell*, 44 Penn. St. 375; *Maher v. Atlantic & Pacific R. R.*, 64 Mo. 267, 17 Am. Ry. Rep. 231.

the appearance of not being in a condition to care for himself, it is the duty of the company to use such care in running their train, if practicable, as not to injure such person.<sup>1</sup> But although the omission thereof may be negligence on the part of the company, and will amount to a want of ordinary care, no recovery can be had by the injured party, or for account of his injury, if an injury be committed under such circumstances, without intentional wrong on the part of the company; for the injured party being thus unauthorizedly and carelessly upon the private track of the company under such circumstances of danger, is guilty of such contributive negligence as will prevent a recovery.<sup>2</sup> And so, likewise, of comparative negligence, where the rule of comparative negligence prevails.

The case cited from 1 Dillon's Circuit Court Reports, *Finlayson v. The Chicago, Burlington & Quincy Railroad Company*, was an action brought by the administratrix of one Finlayson, who was killed in Lee county by the train of the Chicago, Bur-

<sup>1</sup> *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579; *O'Flaherty and others v. The Union R. W. Co.*, 45 Mo. 70; *Isabel v. H. & St. J. R. R. Co.*, *supra*; *Tanner v. L. & N. R. R. Co.*, *supra*; *Kenyon v. N. Y. Cent. & H. R. R. Co.*, 5 Hun, 479; *Colt v. Sixth Ave. R. R. Co.*, 33 N. Y. Superior, 189; *Daniels v. Clegg*, 28 Mich. 41. But where a child is injured while attempting to get upon one of the company's cars, upon the invitation of an employe, there can be no recovery: *Snyder v. Hannibal & St. Joseph R. R. Co.*, 60 Mo. 413, 9 Am. Ry. Rep. 254. Of course, where it is impossible for the train to stop in time, no negligence can be imputed; and the question of negligence in this respect is for the jury: *Pennsylvania R. R. Co. v. Morgan*, 82 Penn. St. 134, 16 Am. Ry. Rep. 89; *Morrissey v. Eastern R. R. Co.*, 126 Mass. 377; *Frick v. St. Louis, K. C. & N. Ry. Co.*, 5 Mo. App. 435; *Schwieger v. N. Y. Cent. & H. R. R. Co.*, 15 Hun, 572; *Walters v. Chi., R. I. & Pac. R. R. Co.*,

41 Ia. 71.

<sup>2</sup> *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579; *Harty v. Cent. R. R. Co. of N. J.*, 42 N. Y. 468, 473; *Maginnis, adm'r, v. N. Y. Cent. & Hudson River R. R. Co.*, 52 N. Y. 215, 223; *Bellefontaine Ry. Co. v. Hunter's adm'r*, 33 Ind. 335; *Chicago & Alton R. R. Co. v. Gretzner*, 46 Ill. 74; *Ill. Cent. R. R. Co. v. Baches*, 55 Ill. 379; *North Penn. R. R. Co. v. Heileman*, 49 Penn. St. 60; *Michigan Central R. R. Co. v. Campau*, 35 Mich. 468, 15 Am. Ry. Rep. 314; *Donaldson v. M. & St. P. Ry. Co.*, *supra*. And the rule is the same as to an employe on the track: *Mulherrin v. Delaware, Lackawanna & Western R. R. Co.*, 81 Penn. St. 366, 15 Am. Ry. Rep. 456. See, however, holding that the company is liable for ordinary negligence under such circumstances: *Murphy v. Chi., Rock Island & Pac. R. R. Co.*, 38 Ia. 539; *S. C.* 45 Ia. 661; *Richmond & Danville R. R. Co. v. Anderson*, 31 Gratt. 812; *Kans. Pac. Ry. Co. v. Cranmer*, 4 Col. 524.

lington & Quincy Railroad Company, whilst he was walking along on the track of the railroad. The deceased was not an employe of the company, nor in any manner connected with the road. In passing near to and in the same course of the railroad, he walked thereon instead of using the ordinary highway, from what motive did not appear. Whilst thus walking on the track he was run over and killed by a train, which approached him from behind. The court, MILLER, Justice, laid down the law to the jury in the following terms. Among other things, he said: ‘

1 “In this case the uncontradicted evidence on both sides is, that the man who was killed was walking on the track of the defendant corporation along the same course the train was going that struck and killed him, and the question arises, what degree of precaution or care a railroad company or its servants are bound to take to guard against injuring a man under such circumstances.

I instruct you as a matter of law, in the first place, that the officers of this corporation, the men who had charge of this train, had a right to presume that this man was a man of sound mind and good hearing, and that the case is not to be considered by you in regard to the diligence of these officers as if he were a deaf man, known to the parties, nor as if he were a child which the parties could see was incapable of taking care of itself.

I instruct you that the agents of the railroad company had a right to suppose he was such a man, of sound mind and sound hearing, and that he would take reasonable care to protect himself in case of danger. Under that view of the case, I further say to you that these agents or officers of the company were bound to give a reasonable and fair notice of their approach, when they found that the man was not taking steps to get out of the way

—such a notice as would reach a man under ordinary circumstances of good hearing, and who had his attention alive to his situation.

If, then, you believe that the bell was rung and that the whistle was sounded, in time to enable this man to get off the track, these parties are guiltless, and the company is not liable. If, on the other hand, you believe they delayed making any signal at all until it was entirely too late for him to get off the track; that they, being aware of his presence, delayed to ring the bell or sound the whistle, until he could not have stepped aside and saved himself—in that case there was negligence on the part of these employes, for which the railroad company is responsible. And I further say to you that the fact that in the place, and at the time where this accident occurred, there was a noise arising from the work on the canal, and a confusion arising from other trains running along the canal bank they were working on, which might be confounded with other trains, and that this fact was well known to the man who was killed, does not vary the matter. That was reason for additional care and diligence on his part; for knowing that he was traveling along a place where there was a loud noise that would impair his power of hearing any bell from a train, or a whistle from a train, it was

It is repeatedly held that the track of a railroad, at private places between stations, belongs to the company exclusively, and is in no sense a public highway for ordinary travel. All

his duty to be more vigilant and more careful, and to watch closely to protect himself. If you find that within this definition of what the duty of the railroad company was, they discharged that duty; if you find that they blew the whistle in time for this man to get off—not to run to some place that he might choose to get off—but if they rang the bell and blew the whistle, in such time as any reasonable man of good hearing could have heard it, and got off instantly, without deliberation or trying to go farther to select a place to get off, then the defendants are not liable. If they delayed ringing the bell or sounding the whistle until they were right on him, then that delay would constitute negligence.

If, however, you find that the railroad company's agents were guilty of negligence, there is still a further inquiry before you can find a verdict in behalf of the plaintiff, and that is the amount of care and precaution which he took to avoid this accident. I lay it down to you that he had no legal right to be on that railroad track; the track at that place not being a crossing or any part of a public highway, was private property; that it was built for other purposes; that it was not built to be walked upon by the public, and the fact that persons did walk upon it, however frequently and however common, does not change the proposition of law. This man had no right to be there, and he should not have been there. It does not follow, however, because he was there unlawfully, that the other party could run him down; but it does follow that he being on private property of the company, on a track which is used for a purpose

which is dangerous to human life, well known to him, that he being in a place where he ought not to be, that he was bound to use every precaution, every diligence, every care, against the possibility or probability of any danger which might happen to him there.

This was his duty, and it was imperative; and if you find, in the language of one of the counsel for the plaintiff, that he was going along the track with his hands in his pockets, his head down, and his attention abstracted from everything around him, then he was guilty of such negligence as forbids recovery. No man has a right to go upon a railroad track in such a place, and go along in a state of abstraction, careless of what might happen to him; and then turn around and say to the railroad company, however negligent they may have been, You are responsible for my safety. If he is careless himself, it can not be expected that the railroads can be made to take care of him, and pay for him if he is killed. Being on the track, and walking in a direction where a railroad train might overtake him, reasonable care required of him that he should be vigilant and watchful to discover the approach of any train, and especially from behind; and this vigilance on his part should be increased, from the fact that the noise from the trains and the blasting on the canal, would tend to prevent his hearing the noise made by the approach of a car or train, or its bell, or its whistle." *Finlayson v. C., B. & Q. R. R. Co.*, 1 Dillon's C. C. R. 579, 582-584.

who invade the same without authority are trespassers. If persons ride, drive, or walk thereon, even at sufferance of the company, they do so at their own risk in all respects, except as against injuries wantonly inflicted by the company, its agents or servants. Such intrusions endanger the safety of passengers traveling in the cars; and if such intruders be injured, except it is by the wanton act of the company, no recovery can be had in their favor; and such, too, is the law, they being guilty in that respect of gross negligence, even if the company be slightly negligent.<sup>1</sup>

And it does not matter in respect to such intruders that the injury occur when the train is out of time, for the rules and regulations of a railroad company in regard to the running of its trains, as to the times of arrival and departure, are for the guidance of its agents and servants, and not for the information of the public; and so, likewise, in reference to the distance within which trains going in the same direction may approach to each other.<sup>2</sup> And it is not a circumstance that will excuse one from the effects of his own thoughtlessness, or that will inculcate the company, as to an injury to one's person, that the train by which the injury is inflicted is proceeding at the same time within a less distance of one just ahead of it than the rules and regulations allow.<sup>3</sup> It is the right of the company to run its trains, so far as outsiders are concerned, as close together as it may choose; for the use of its own road is its right. The regulation which prohibits too close an approach to each other is for the protection of the company itself and its property, and those whom, or property which, it carries, and is not a rule having respect or regard to those who travel the ordinary highway, or others not concerned in the business of the company, and who are not passengers on a train.<sup>4</sup> A passenger on a train which approaches too close to another, may complain of the breach of such a rule,

<sup>1</sup> *Terre Haute & Indianapolis R. R. Co. v. Graham*, 46 Ind. 239; *Jeffersonville, Madison & Indianapolis R. R. Co. v. Goldsmith*, 47 Ind. 43; *Carlin v. Chi., Rock Isld. & Pacific R. R. Co.*, 37 Iowa, 316.

<sup>2</sup> *Phila. & Reading R. R. Co. v. Spearen*, 47 Penn. St. (11 Wright),

300.

<sup>3</sup> *Phila. & Reading R. R. Co. v. Spearen*, 47 Penn. St. (11 Wright), 300.

<sup>4</sup> *Phila. & Reading R. R. Co. v. Spearen*, 47 Penn. St. (11 Wright), 300.

if such approach causes or contributes to his injury, for the breach thereof violates the duty of the company to do all in their power to carry him safely.<sup>1</sup> And we may add, that it is not the fact that the rule is broken, in such case, that creates liability, but the fact of approaching dangerously close, which would be equally reprehensible if no such rules existed.

Where a foreman or trackmaster of a railroad company employed a person with his team to clear snow from the track, and agreed to inform him of the coming of trains, which he neglected to do, and in consequence thereof the person thus employed was injured, the railroad company was held liable. It was held that the employe had authority to make such agreement and bind the company thereby, and having made it, the plaintiff might rely upon the promise, and upon the experience of the foreman, and would not be bound to the same degree of vigilance himself, as if no such arrangement had been made.<sup>4</sup>

Where a release of damages for an injury is set up by the railroad company in defense of the action, and is attempted to be impeached for fraud, the evidence of fraud must be clear, precise and indubitable.<sup>3</sup>

Different rules, it would seem, apply to injuries sustained by persons on railroad bridges from those governing injuries inflicted while the person is actually on the track; and in a case where a child was killed by falling from such bridge, it was held it was not necessary to prove the child was actually struck by the train, but if the fall was occasioned by the negligence of the company, it was liable.<sup>4</sup>

**4. Injury to persons crossing the track at crossings.**—It is the duty of persons crossing a railroad track in public highways, or at authorized private crossings, as, for instance, farm crossings,

<sup>1</sup> Phila. & Reading R. R. Co. v. Spearen, 47 Penn. St. (11 Wright), 300. And a rule prohibiting freight trains from passing between a station and a standing passenger train is intended for the protection of passengers, and not for persons carelessly walking on the track; and a failure to observe the rule will not render the company liable to such person: Lake Shore & Michigan Southern R. R.

Co. v. Hart, 87 Ill. 529, 19 Am. Ry. Rep. 249.

<sup>2</sup> Bradley v. New York Central R. Co., 62 N. Y. 99, 12 Am. Ry. Rep. 160. And see Balt. & Ohio R. R. Co. v. Whittington, 30 Gratt. 805.

<sup>3</sup> Pennsylvania R. R. Co. v. Shay, 82 Penn. St. 198, 15 Am. Ry. Rep. 462.

<sup>4</sup> McMillan v. B. & M. R. R. Co., 46 Ia. 231, 16 Am. Ry. Rep. 239.

to keep a prudent lookout for trains, or resort to other prudent means of ascertaining that they may safely cross, and, if a train be seen, or heard, or ascertained to be approaching, to wait until it has passed; for the railroad trains are entitled to the right of way or precedence at crossings. If a person attempt to cross before an approaching train, it is at his own peril. The company are not obliged to stop their trains and yield the right of way to persons waiting and desiring to pass; nor will they be liable for injuries inflicted, unless designedly done, if they have merely omitted to stop and give the right of way, provided they have carefully observed all the requirements of the law in regard to signals and other conduct at such crossings, and have in all other respects used proper care to avoid an injury to persons about to pass.<sup>1</sup>

<sup>1</sup> Warner *v.* New York Cent. R. R. Co., 44 N. Y. 465; Weber *v.* N. Y. Cent. & H. R. R. R. Co., 58 N. Y. 451; S. C. 67 N. Y. 587; Mitchell *v.* Same, 64 N. Y. 655; Salter *v.* Utica & B. R. R. R. Co., 75 N. Y. 273; S. C. 13 Hun, 187; Cordell *v.* N. Y. Cent. & H. R. R. R. Co., 75 N. Y. 330; S. C. 70 N. Y. 119, and 64 N. Y. 535; Adolph *v.* Cent. Park, N. & E. River R. R. Co., 76 N. Y. 530; S. C. 65 N. Y. 554; Elwood *v.* N. Y. Cent. & H. R. R. R. Co., 4 Hun, 808; Bunn *v.* Del., Lack. & Western R. R. Co., 6 Hun, 303; Sutherland *v.* N. Y. Cent. & H. R. R. R. Co., 41 N. Y. Superior, 17; Chi., Rock Island & Pac. R. R. Co. *v.* Houston, 95 U. S. 697; Grows *v.* Me. Cent. R. R. Co., 67 Me. 100; Nagle *v.* Allegheny Valley R. R. Co., 88 Penn. St. 35; Balt. & Ohio R. R. Co. *v.* Sherman, 30 Gratt. 629; Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. *v.* Elliott, 28 Ohio St. 340, 14 Am. Ry. Rep. 123; Penn. Co. *v.* Rathgeb, 32 Ohio St. 66; Balt. & Ohio R. R. Co. *v.* Whitacre, 35 *Id.* 627; Same *v.* Whittaker, 24 *Id.* 642; Chi. & N. W. Ry. Co. *v.* Hatch, 79 Ill. 137; Chi., Burlington & Quincy R. R. Co. *v.* Harwood, 80 Ill. 88; Rockford, R.

I. & St. L. R. R. Co. *v.* Byam, *Id.* 528; Chi., Burlington & Quincy R. R. Co. *v.* Damerell, 81 Ill. 450; Ills. Cent. R. R. Co. *v.* Hetherington, 83 Ill. 510; Chi. & Alton R. R. Co. *v.* Becker, 84 Ill. 483; Lake Shore & Mich. Southern Ry. Co. *v.* Sunderland, 2 Bradw. (Ill.) 307; Same *v.* Clemens, 5 *Id.* 77; Toledo, Wabash & Western Ry. Co. *v.* Shuckman, 50 Ind. 42; St. Louis & S. E. Ry. Co. *v.* Mathias, *Id.* 65; Penn. Co. *v.* Sinclair, 62 Ind. 301; Spencer *v.* Ill. Cent. R. R. Co., 29 Iowa, 55; Artz *v.* Chi., R. I. & P. R. R. Co., 34 Ia. 153; S. C. 38 Ia. 293, and 44 Ia. 234; Benton *v.* Cent. R. R. Co., 42 Ia. 192; Lang *v.* Holiday Creek R. & C. M. Co., 49 Ia. 469; Starry *v.* Dubuque & S. W. R. R. Co., 51 Ia. 419; Haas *v.* Chi. & N. W. Ry. Co., 41 Wis. 44; Brown *v.* Milw. & St. Paul Ry. Co., 22 Minn. 165; Solen *v.* Va. & Truckee R. R. Co., 13 Nev. 106; Bunting *v.* Cent. Pac. R. R. Co., 14 Nev. 351; Fletcher *v.* Atlantic & Pac. R. R. Co., 64 Mo. 484; Leduke *v.* St. Louis & Iron Mountain R. R. Co., 4 Mo. App. 485; New Orleans, Jackson & Great Northern R. R. Co. *v.* Mitchell, 52 Miss. 808; South & N. Ala. R. R. Co. *v.* Thompson, 62 Ala. 494;

**5. Injury received passing under the cars.**—It is such gross negligence and want of care, and so reckless an act, for a person to attempt to pass under the cars, though standing still at the time of the inception of the effort, that if an injury is received in the attempt, a recovery can not be had against the company for the same, even if the cars be suddenly started without giving the usual signal for starting, and thereby cause the injury.<sup>1</sup>

**6. Injuries to persons accompanying passengers to the cars.**—Persons lawfully upon the cars to see and aid female friends, who are taking passage thereon, safely started on their journey, or, who are on the platform to meet or part with arriving or departing friends, though in no sense passengers themselves, are nevertheless present there for legitimate purposes, and are entitled to ordinary care from the railroad company as against personal injury.<sup>2</sup> Thus, where by the giving way of a depot platform, on which were a crowd of people, some of them were injured, it was held that it being the duty of the company to provide safe appliances and erections at such places, for the accommodation of passengers arriving thereat and departing therefrom, the same duty devolved on it in regard to such persons also as were lawfully there to receive expected friends, or to see, and assist in getting on the cars, friends who were leaving by the train; and therefore, if injured for want of ordinary care of the company in respect to such erections, while present on such platform, the company were liable, if without contributory negligence on the part of the persons thus injured.<sup>3</sup> And so where a person seeing a female relative into the cars, which she is taking in the night, is for that purpose aboard the train, he is legally there for a reason-

Northern Cent. Ry. Co. v. State, 54 Md. 113; S. C. 10 Repr. 662; Dublin, W. & W. Ry. Co. v. Slaterry, L. R. 3 App. Cas. 1155; S. C. Irish Rep. 8 C. L. 531, and 10 *Id.* 256; Nicholls v. Great Western Ry. Co., 27 Upp. Can., Q. B., 382.

<sup>1</sup>Cent. R. R. & Banking Co. v. Dixon, 42 Geo. 327; Lewis v. Baltimore & Ohio R. R. Co., 38 Md. 588; Gahagan v. Boston & Lowell R. R. Co., 1 Allen, 187; O'Mara v. Del. & Hudson Canal Co., 18 Hun, 192;

Memphis & Charleston R. R. Co. v. Copeland, 61 Ala. 376; Stillson v. Hannibal & St. Jos. R. R. Co., 67 Mo. 671.

<sup>2</sup>Doss v. Missouri, Kansas & Texas R. R. Co., 59 Mo. 27; S. C. 8 Am. R. W. Reps. 462; Gillis v. The Penn. R. R. Co., 59 Penn. St. 129; Dublin, W. & W. Ry. Co. v. Slaterry, Law Rep. 3 App. Cas. 1155; S. C. Irish Rep., 8 C. L. 531, and 10 *Id.* 256.

<sup>3</sup>Gillis v. Penn. R. R. Co., 59 Penn. St. 129.



able time in which to relieve himself of his trust, and safely leave, and is entitled to such reasonable time, and to the ordinary care of the company to avoid injury, such as warnings to start, or call for all aboard; and if, by the omission of such ordinary care by the company, he be injured in an effort to leave the train, and at the same time observes due care on his part, and is not himself guilty of contributory negligence, the company are liable in an action for such injury.<sup>1</sup>

**7. Injury to persons at station.**—The care and caution required of railroad companies in running their trains is commensurate with the danger to persons and property incident to that mode of conveyance.<sup>2</sup> Thus in running through towns and cities, and over public crossings, or in the vicinity of their stations, they must exercise care and caution commensurate with the risk of accident at such places.<sup>3</sup>

Where the plaintiff, a child, was injured by being struck by a timber projecting from a freight car, while he was standing upon the platform of a station, and it appeared that he had been frequently told to keep off the platform, it was held this direction was, under the circumstances, merely admonitory, and not imperative, in such sense as to make him a trespasser;<sup>4</sup> that his having no right or business there did not constitute him a trespasser,<sup>5</sup> and his being there was not negligence contributing directly to his injury.<sup>6</sup> It was further held that even if the child were to be considered a trespasser, the company would be liable for all injury resulting from want of ordinary care, and their liability would not be restricted to those injuries which were wanton.<sup>7</sup>

<sup>1</sup> *Doss v. The Missouri, Kansas & Texas R. R. Co.*, 59 Mo. 27; S. C. 8 Am. R. W. Reps. 462.

<sup>2</sup> *Hicks v. Pacific R. R. Co.*, 64 Mo. 430, 17 Am. Ry. Rep. 273.

<sup>3</sup> *Hicks v. Pac. R. R. Co.*

<sup>4</sup> *Hicks v. Pac. R. R. Co.*

<sup>5</sup> *Hicks v. Pac. R. R. Co.*

<sup>6</sup> *Hicks v. Pac. R. R. Co.*

<sup>7</sup> *Hicks v. Pac. R. R. Co.*

## CHAPTER LIV.

### PERSONAL INJURY RESULTING IN DEATH.

	Section.		Section.
No action for at common law . . . . .	1	resulting in death . . . . .	5
Action by statute . . . . .	2	A claim of damages for personal	
The statutory action is local to the		injury is not assets . . . . .	6
state wherein the injury occurs . . . . .	3	Pleadings and evidence in actions	
Indictment for, under statute, to		for personal injuries causing	
recover penalty . . . . .	4	death . . . . .	7
Measure of damages for injuries . . . . .		Limitation of action for . . . . .	8

**1. No action for at common law.**—No action lies at common law, by the administrator or executor, for the death of a person, when caused by personal injury; nor by the wife, husband, or other kindred of the deceased. The reason of the ruling as given is, that the personal injury is merged in the felony or public offense.<sup>1</sup> But this reason is not always applicable, for sometimes the act causing the death is not felonious, but is such an one as amounts merely to a tort. The better reason, in such latter class of cases, would seem to be that actions for injuries to the person, or in other words, actions for torts, do not survive at common law, on the death of the party injured, or of the party committing the injury, and therefore no action could be maintained after the

<sup>1</sup>Carey v. The Berkshire R. R. Co., and Skinner v. The Housatonic R. R. Co., 1 Cush. 475; S. C. 1 Am. R. W. Cas 442; Kearney v. Boston & Worcester R. R. Co., 9 Cush. 109; Hollenbeck v. The Berkshire R. R. Co., 9 Cush. 480; Richardson v. N. York Cent. R. R. Co., 98 Mass. 85; Worley v. Cin., Hamilton & Dayton R. R. Co., 1 Handy (Ohio), 481; Quin v. Moore, 15 N. Y. 432; Green v. The Hudson River R. R. Co., 16 How. Pr. 230; S. C. 41 N. Y. (2 Keyes), 294, 28 Barb. 9; Eden v. Lexington & Frankfort R. R. Co., 14 B. Mon. 165; Pennsylvania R. R. Co. v.

Henderson, 51 Penn. St. 315, 322; Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's admr., 27 Ind. 513; Selma, Rome & Dalton R. R. Co. v. Lacy, 43 Ga. 461; Kramer v. San Francisco Market Str. R. R. Co., 25 Cal. 434. But at the civil law the action lies, and may be enforced in the Admiralty (District) Court of the United States, when the death is the result of a marine tort: Holmes v. Oregon & Cal. Ry. Co., 6 Sawyer, 262; S. C. 5 Fed. Repr. 75, 1 Am. & Eng. R. R. Cas. 623.

death of those to whom, or against whom, the right of action originally accrued.<sup>1</sup>

But this application of the rule of the English law, "that in a civil court the death of a human being can not be complained of as an injury," was silently ignored by Justice COWEN, and afterward by the whole court, in *Ford v. Monroe*, an action by a father for loss of service by the death of his son, and a recovery was allowed in the case.<sup>2</sup> In a subsequent case, however, the Supreme Court of Massachusetts, METCALF, Justice, after referring to the case of *Ford v. Monroe*, reassert the doctrine of the English law, and hold that an action will not lie at the suit of a father for the death of his minor son.<sup>3</sup>

And so in Kentucky it was held, early in the history of railroads in that state, that a civil action would not lie at common law for the death of a person—that the civil injury is regarded as being merged in the felony; and that a husband or father might maintain an action for expenses incurred by reason of an injury wrongfully inflicted on his wife or child—that is, expenses up to the death, if death ensued—but not for the death.<sup>5</sup> In the leading case here cited, the death of the wife was instantaneous with the injury itself, and the court held that no action at all would lie.<sup>6</sup>

**2. Action by statute.**—Although, as we have seen under the preceding head of this chapter, an action at common law does not lie against a person for causing the death of another, however negligently or wrongfully it may have been caused, yet such action, under various modifications and provisions, is now given by statute in most of the states, and in some of them a

<sup>1</sup> *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Cregin v. Brooklyn Cross-town R. R. Co.*, 75 N. Y. 192.

<sup>2</sup> 20 Wend. 210. See *Cutting v. Scabury*, 1 Sprague, 522; *Osborn v. Gillett*, L. R. 8 Exch. 88; *McGovern v. N. Y. Cent. & H. R. R. Co.*, 67 N. Y. 417.

<sup>3</sup> *Carey v. Berkshire R. R. Co.*, 1 Cush. 475; S. C. 1 Am. R. W. Cas. 412.

<sup>4</sup> *Eden v. The Lexington & Frankfort R. R. Co.*, 14 B. Mon. 165.

<sup>5</sup> *Eden v. The Lexington & Frankfort R. R. Co.*, 14 B. Mon. 165; *Potter v. Metropolitan Dist. Ry. Co.*, 30 Law Reporter (N. S.), 765; *Bradshaw v. Lancashire & Y. Ry. Co.*, Law Rep. 10 C. P. 189. See *Walters v. C.*, R. I. & P. R. R. Co., 36 Ia. 458; S. C. 41 Ia. 71. This right of action will abate by the death of the husband or father: *Cregin v. Brooklyn C. R. R. Co.*, *supra*.

<sup>6</sup> *Eden v. The Lexington & Frankfort R. R. Co.*, *supra*.

remedy is given by indictment. In either case, however, the recovery is usually for the benefit of the next of kin, or for some of them designated by the statute. The right thus given by statute may be enforced in the federal courts, whenever the citizenship of the parties or the nature of the subject will permit. And where the death is the result of a marine tort, the District Court of the United States has jurisdiction of such a suit.<sup>1</sup>

A right of action is given for personal injuries wrongfully causing death in Connecticut, and damages are by statute fixed at not less than one thousand, nor more than five thousand, dollars, recoverable by the administrator or executor, for injuries caused to passengers by the negligence of railroad companies, or to persons crossing the railroad upon highways, and who in either case are observing ordinary care to avoid injury.<sup>2</sup> The recovery in such case is for the benefit of the husband, the widow, or the heirs at law of the deceased, as the case may be.<sup>3</sup>

In an action prosecuted under this statute, it is competent for the defendant to show, in diminution of damages, that there was in fact no negligence whatever on its part, and that there was a want of care on the part of the deceased, at the time of the injury, although a contrary state of facts be charged in the petition or declaration of the plaintiff, and the proceeding be for an assessment of damages thereon, after overruling of defendant's demurrer.<sup>4</sup> Though the effect of the demurrer in such case is to admit

<sup>1</sup> *Holmes v. Oregon & Cal. Ry. Co.*, 6 Sawyer, 262; S. C. 5 Fed. Repr. 75, 1 Am. & Eng. R. R. Cas. 623. But see *Armstrong v. Beadle*, 5 Sawyer, 484; S. C. 8 Repr. 36. No remedy exists in chancery in such case: *Brown v. Wabash Ry. Co.*, 96 Ill. 297; S. C. 1 Am. & Eng. R. R. Cas. 626.

<sup>2</sup> Gen'l Statutes, Title 7, Sec. 544; *Carey, admr., v. Day and others, Trustees*, 36 Conn. 152.

<sup>3</sup> *Carey, admr., v. Day and others, Trustees*, 36 Conn. 152.

<sup>4</sup> *Carey, admr., v. Day and others, Trustees*, 36 Conn. 152; and so under the Tennessee statute; *Louisville & Nashville R. R. Co. v. Connor*, 9 Heisk. 19; S. C. 2 Baxt. 382, and 21 Am. Ry. Rep. 194. And see *Elliott v. St. Louis*

& Iron Mountain R. R. Co., 67 Mo. 272; *Balt. & Ohio R. R. Co. v. Sherman*, 30 Gratt. 602; *Same v. Whittington*, *Id.* 805; *Richmond & Danville R. R. Co. v. Anderson*, 31 *Id.* 812; *Darling v. Williams*, 35 Ohio St. 58; *Patterson v. Burlington & Mo. River R. R. Co.*, 38 Ia. 279; *Murphy v. C., R. I. & Pac. R. R. Co.*, *Id.* 539; S. C. 45 *Id.* 661; *Schappert v. Ringler*, 45 N. Y. Superior Ct. 345. And, of course, if the deceased has made a settlement with the company during his lifetime, no right of action will survive by the statute: *Fowlkes v. Nashville & Decatur R. R. Co.*, 5 Baxt. 663; *Read v. Great Eastern Ry. Co.*, Law Rep. 3 Q. B. 555.

the truth of the petition, yet without further evidence on the part of the plaintiff, only nominal damages could at common law be awarded, and as a sequence, only the lowest sum contemplated by the statute in proceedings thereon, which is one thousand dollars.<sup>1</sup> Therefore, if in such a proceeding the plaintiff introduces no testimony at all, then the giving of the evidence above referred to by the defendant, can work no harm; it can not influence the case one way or the other.<sup>2</sup> But if, on the contrary, the plaintiff give other evidence than the mere legal admission to the jury, to enhance the amount of their finding, then it is but proper for defendant to prove such facts in contravention thereof, and by way of diminishing damages, upon general principles.<sup>3</sup>

The effect of the statute, in Connecticut, is not only to give a right of action to the administrator or executor, where none existed at common law,<sup>4</sup> and to limit the amount of recovery within certain bounds, but also to confer the benefits or fruits of the recovery upon the relatives of the deceased; for whilst it clothes the executor and administrator with the right of action for their benefit, it clearly, by implication, denies such right of action for the general benefit of the estate. Such is the ruling of the Supreme Court of Connecticut.<sup>5</sup> Whether a petition or declaration would, or would not, be bad on demurrer, under that statute, which did not show affirmatively the existence of such relatives as those for whose benefit the action lies,<sup>6</sup> yet proof of their existence is necessary on the trial, to enable plaintiff to recover.<sup>7</sup>

In the same state, and in the case last cited from 33 Connect-

<sup>1</sup> Carey, admr., v. Day and others, Trustees, 36 Conn. 152; Lamphear v. Buckingham, 33 Conn. 237, 252.

<sup>2</sup> Carey, admr., v. Day and others, Trustees, 36 Conn. 152.

<sup>3</sup> Havens v. Hartford & N. Haven R. R. Co., 28 Conn. 69; Daily v. New York & N. Haven R. R. Co., 32 Conn. 356; Lamphear v. Buckingham, 33 Conn. 237; Carey, admr., v. Day and others, Trustees, 36 Conn. 152.

<sup>4</sup> Goodsell v. Hartford & N. Haven R. R. Co., 33 Conn. 51, 55; Waldo v. Goodsell, 33 Conn. 432, 434.

<sup>5</sup> Andrews v. Hartford & N. Haven

R. R. Co., 34 Conn. 57.

<sup>6</sup> Andrews v. Hartford & N. Haven R. R. Co., 34 Conn. 57.

<sup>7</sup> Lamphear v. Buckingham, 33 Conn. 237; Comm. v. Boston & Albany R. R. Co., 121 Mass. 36; State v. Cons. European & N. Am. Ry. Co., 67 Me. 479. *Contra*, Balt. & Ohio R. R. Co. v. Wightman, 29 Gratt. 431; Matthews v. Warner, *Id.* 570; Balt. & Ohio R. R. Co. v. Sherman, 30 Gratt. 602. The existence of any of them will maintain the action: Kansas Pacific Ry. Co. v. Miller, 2 Col. 442, 20 Am. Ry. Rep. 245.

icent, it is settled that where an action would lie in a like case against a railroad corporation itself, it will in like manner lie against a trustee in charge of a railroad, operating it for the benefit of bondholders and creditors; but this point is decided by effect of a subsequent statute of that state, extending the liability of railroads to cases arising under the management of trustees.<sup>1</sup>

The action in this class of cases, accrues, under the Connecticut statute, at the death of the person, and not by the injury which causes the death,<sup>2</sup> although the cause of the action relates back to and depends upon the character of the injury, as to the negligence of the defendant and the carefulness of the deceased;<sup>3</sup> and therefore, the statute of limitations commences to run only from the date of the appointment of an administrator, or granting of letters testamentary upon the decedent's estate. For that although the right of action is in law complete by the death of the injured person, yet as until an administrator be appointed, or letters testamentary be granted, there is no one competent to sue, therefore the statute can only run from the time of the performance of these acts.<sup>4</sup>

Under the same statute, where a husband and wife were both injured at the same time, and by the same occurrence, as passengers upon a railroad, by reason of which injuries they both died, the wife surviving the husband, however, a short time, and they, nor either of them, not having any children, it was holden that the right of damages at the death of the husband vested in the wife, and belonged wholly to her, under the statute, and at her death descended to her own proper heirs, and no part thereof to the heirs of the husband.<sup>5</sup>

<sup>1</sup> *Lamphear v. Buckingham*, 33 Conn. 237, 246. And see *Ballou v. Farnum*, 9 Allen, 47; *S. C.* 11 Allen, 73; *Sprague v. Smith*, 29 Vt. 421; *Rogers v. Wheeler*, 43 N. Y. 598; *Barter v. Wheeler*, 49 N. H. 9.

<sup>2</sup> *Andrews v. Hartford & N. Haven R. R. Co.*, 34 Conn. 57; *The Jeffersonville R. R. Co. v. Swayne's admr.*, 26 Ind. 477, 484.

<sup>3</sup> *Goodsell & another v. Hartford & N. Haven R. R. Co.*, 33 Conn. 51. See *Louisville & Nashville R. R. Co. v.*

*Burke*, 6 Coldw. 45.

<sup>4</sup> *Andrews v. Hartford & N. Haven R. R. Co.*, 34 Conn. 57; *Sherman v. Western Stage Co.*, 24 Ia. 515. But see, holding that the limitation runs from the death, *Fowlkes v. Nashville & Decatur R. R. Co.*, 9 Heisk. 829; *S. C.* 5 Baxt. 663; *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 306; *Jeffersonville, Mad. & Ind. R. R. Co. v. Hendricks*, 41 Ind. 48.

<sup>5</sup> *Waldo v. Goodsell*, 33 Conn. 432. In this case the Supreme Court of

But aside from the question of survivor of actions for personal torts or injuries at common law, there was a statute of Connecticut giving to the executor or administrator an action for such injuries, as early as 1848, whereby it is declared that "Actions for injury to the person, whether the same do or do not result in death, actions for injury to the reputation, actions for injury to the property, real or personal, and actions to recover damages for injury to the person of the wife, child or servant of any deceased person, shall survive to his executor or administrator; provided the cause of action shall not have arisen more than one year before the death of the deceased, and shall have arisen since the 27th day of June, 1848." Under this statute, it is holden that a right of action for injuries resulting in death, survived to the representative of the deceased, and that it was not merely intended to apply to actions already pending at the death of the party injured and in his name, for an injury previously incurred.<sup>1</sup>

By this statute, the recovery, if any be had, is evidently for the benefit of the decedent's estate generally, and not for the relations, as provided in the subsequent act hereinbefore referred to;

Connecticut say: "The money is to be sued for and recovered by the executor or administrator of the husband in a case like this, for the benefit of the widow. There being no children the whole belongs to her. The right to it becomes fixed by the death of the husband and at his death. The only contingency is as to the time of payment. That depends of course upon a settlement or recovery. If her right depended upon the fact of her being alive at the time of the judgment in a lawsuit, there never could be a settlement with her which would be safe for the company. It would be in the power of the representative of the husband, who must be supposed to be in the interest of his heirs, to keep the case in court indefinitely, in the expectation of her decease and a consequent change in the title to the property. The value of her interest, and per-

haps the means of her support, might depend upon her winning in the strife between life and litigation. The husband could not bequeath the damages away from her (as a part of his estate), and why should his executor be allowed to deprive her of it indirectly. The rule that her title vests absolutely in her at his death is simple, certain, and consistent with both the language, and, as we think, the obvious intention of the statute." *Waldo v. Goodsell*, 33 Conn. 434, 435. Where the husband and wife are killed by the same accident, and there is no evidence as to the time of their deaths, respectively, the presumption is that they died at the same moment: *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245.

<sup>1</sup> *Soule v. N. Y. & N. Haven R. R. Co.*, 24 Conn. 575.

and there was no statutory limit as to the amount of the damages to be recovered. Hence, as stated by the learned judge in *Andrews v. Hartford & N. Haven R. R. Co.*,<sup>1</sup> the effect of the subsequent act was to limit the amount of recovery to within from one to five thousand dollars, in cases resulting in death, and to give the benefit of the fund, when recovered, to the relatives of the deceased exclusively, after deducting the expenses of recovering and administering upon the same.

And in Connecticut the ruling is, that as a matter of comity, a foreign administrator may have ancillary letters in that state as a matter of right, from the court of probate, for the purpose of prosecuting in good faith the claim for compensation, under the statute, for the death of his intestate, caused in the state of Connecticut, by the negligence of a railroad therein—such decedent being, at the time of his injury and death, a citizen and resident of a different state, and administration having been granted therein upon his estate.<sup>2</sup> As to this right of the foreign administrator, the Supreme Court of Connecticut say, BUTLER, Justice: “we are all satisfied that the claim which the administrator has against the railroad company, under the statutes of the state, was sufficient to entitle him to ancillary administration here.” “The claim, if valid, is property within the meaning of the statute.”<sup>3</sup>

Though, in New Jersey, the recovery is for the benefit of the widow and next of kin, yet the action will lie, under the statute, notwithstanding there be no widow, if there still be next of kin. It is not restricted to cases where the deceased leaves a widow as well as next of kin; but in case there be no widow, the action may still be maintained by the personal representatives of the deceased, and is then for the sole benefit of the next of kin.<sup>4</sup>

And so in Ohio, under a similar statute, allowing an action, in the name of the personal representatives, for an injury resulting in death, and declaring the recovery to be for the benefit of the widow and next of kin of the deceased, to be distributed amongst

<sup>1</sup> 34 Conn. 57.

<sup>2</sup> *Hartford & N. Haven R. R. Co. v. Andrews*, 36 Conn. 213. See *Conner v. Paul*, 12 Bush, 144.

<sup>3</sup> *Hartford & N. Haven R. R. Co. v.*

*Andrews*, 36 Conn. 213; *Marcy v. Marcy*, 32 Conn. 308.

<sup>4</sup> *Haggerty v. The Central R. R. Co.*, 2 Vroom, 349; *Harrison v. Same, Ib.* 293.



them in the proportion provided by law in relation to personal estate, it is held that the action lies though there be no widow;<sup>1</sup> and also lies, though no special cause of injury to the survivors be alleged, other than the death.<sup>2</sup> The measure of damages under the statute (act of 25 March, 1851), is what the jury deem fair and just with reference to the pecuniary injury or loss, not exceeding five thousand dollars.<sup>3</sup> But the action will not lie if there be neither widow nor next of kin; the administrator is but trustee for them.<sup>4</sup>

Under the statute of Indiana, giving an action to the personal representatives of the deceased for causing the death of one by a wrongful act, it is held by the courts of that state, that such action will lie only when the circumstances and facts of the case are such that the deceased himself could have maintained the action and recovered therein, for the injury received, in case he had survived the injury;<sup>5</sup> and that, therefore, if it appear, in an action brought by the personal representative for the death of another, that the deceased himself, by his own negligence, contributed to bringing upon himself the injury, there can be no recovery, unless the conduct of the defendant was such as to amount to intentional wrong in inflicting the injury.<sup>6</sup>

The action in that state for the death of a child, is given to the father, if living, but if dead, or if he has abandoned his family, or is imprisoned, then the right of action is in the mother, or guardian of the child for his ward; if neither, then by the administrator.<sup>7</sup> It must be commenced within two years from the death; and the recovery is for the exclusive benefit of

<sup>1</sup> Johnston, admr., v. The Cleveland & Toledo R. R. Co., 7 Ohio St. 336.

<sup>2</sup> Johnston, admr., v. The Cleveland & Toledo R. R. Co., 7 Ohio St. 336.

<sup>3</sup> Johnston, admr., v. The Cleveland & Toledo R. R. Co., 7 Ohio St. 336.

<sup>4</sup> Johnston v. The Cleveland & Toledo R. R. Co., 7 Ohio St. 336. But an illegitimate child of a woman whose life is thus taken, is next of kin to the deceased, and the action lies in its favor, if there be no other: Muhl's admr. v. The Mich. Southern R. R.

Co., 10 Ohio St. 272.

<sup>5</sup> Evansville & Crawfordsville R. R. Co. v. Lowdermilk, admr. of Smith, 15 Ind. (Harrison), 120.

<sup>6</sup> Evansville & Crawfordsville R. R. Co. v. Lowdermilk, admr. of Smith, 15 Ind. (Harrison), 120. And see Blaker's Executrix v. The Receivers, etc., 30 N. J. Eq. 240, 18 Am. Ry. Rep. 81.

<sup>7</sup> Pittsburgh, Fort Wayne & Chi. Ry. Co. v. Vining's admr., 27 Ind. 513, 519; Perry v. Carmichael, 95 Ill. 519; S. C. 1 Am. & Eng. R. R. Cas. 174.

the widow and children, if there be such, or next of kin, and is to be distributed according to the manner of distributing the personal effects of a decedent.<sup>1</sup>

The word "child," as used in the Indiana statute, is construed by the courts not to be intended in the enlarged sense, as equivalent to the word minor, but is to be limited in its application to one who occupies the position of a child to a parent, as depending on the parent for protection, education and support, and can not be held to include one who, although in his minority, has assumed the relations and responsibilities of the head of a family.<sup>2</sup> In that state, for the death of a child, the action is to be brought by the father, or other relation or person above named, in the order there named.<sup>3</sup> No recovery can be had, however, in such case, if from the evidence it appear that the child for whose death the action is brought, was by his parents unnecessarily or negligently exposed to the danger which caused his death, and against which his judgment was too immature to afford him protection, unless the evidence also shows such recklessness on the part of the defendant as implies a willingness to inflict the injury. And such, we take it, is the general rule.<sup>4</sup>

By the statute of Georgia of 1850, the action for injuries

<sup>1</sup> *Pittsburgh, Fort Wayne & Chi. Ry. Co. v. Vining's admr.*, 27 Ind. 513, 519. See *Perry v. Carmichael*, 95 Ill. 519; *S. C. 1 Am. & Eng. R. R. Cas.* 174—an action against an administrator for permitting the husband of a deceased wife to collect and retain the damages for her death. The administrator is accountable for the distribution, and is liable, in such case, to the children and heirs of the deceased: *Ibid.*

<sup>2</sup> *The Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's admr.*, 27 Ind. 513, 519.

<sup>3</sup> *The Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's admr.*, 27 Ind. 513, 519.

<sup>4</sup> *The Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's admr.*, 27 Ind. 513, 519, 520; *Lafayette &*

*Indianapolis R. R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, Mad. & Ind. R. R. Co. v. Bowen*, 40 Ind. 545; *S. C.* 49 Ind. 154; *Evansville & Crawfordsville R. R. Co. v. Wolf*, 59 Ind. 89; *Ewen v. Chi. & N. W. Ry. Co.*, 38 Wis. 613; *Penn. R. R. Co. v. Lewis*, 79 Penn. St. 33; *Smith v. Hestonville, M. & F. Pass. Ry. Co.*, 92 Penn. St. 450; *S. C.* 37 Leg. Int: 95, 10 Cent. L. J. 272. It is not error for the court to refuse to instruct the jury that if the deceased had a tendency to insanity and disease, and the injury complained of would not have caused the death of a well person, it could not be regarded as the proximate cause of death: *Jeffersonville, Madison & Indianapolis R. R. Co. v. Riley*, 39 Ind. 568, 10 Am. Ry. Rep. 325.

resulting in death is to be brought in the county wherein is situated the principal office or place of business of the company.<sup>1</sup> If it be for the death of the husband, suit is to be brought in the name of the widow, and for her benefit; if no widow, then in the name of the children, and for their benefit, if there be a child or children. For the death of the wife, no action is given by statute; it remains as at common law, and no action lies.<sup>2</sup> To maintain the action, the killing must be so far wrongful that if the deceased had survived, an action for the injury would have lain in his favor. If deceased had contracted to run the risk, no action would lie.<sup>3</sup>

The statute of New York of 1847, amended in 1849, gives a right of action to the personal representative where the death of a person is caused by a wrongful act, neglect or default, which would, if death had not ensued, entitle the injured party to an action and damages in respect thereof. The recovery is for the exclusive benefit of the widow and next of kin, and is to be distributed among them in the proportions provided by law as to personal property.<sup>4</sup> By the amendment of 1849, the recovery is limited to five thousand dollars.<sup>5</sup>

The statute authorizes the jury to give such damages as shall seem fair and just, in reference to the pecuniary injury resulting from the death to the wife and next of kin of such deceased person (not exceeding five thousand dollars).<sup>6</sup> To recover in such action, it is not necessary that the persons entitled to the fund shall be of such as to have given them a legal right to pecuniary benefit from the deceased, if living.<sup>7</sup> And it may be

<sup>1</sup> *South Western R. R. Co. v. Paulk*, 24 Geo. 356.

<sup>2</sup> *Georgia R. R. & Banking Co. v. Wynn*, 42 Geo. 331.

<sup>3</sup> *Western & Atlantic R. R. Co. v. Strong*, 52 Geo. 461.

<sup>4</sup> *Oldfield v. N. York & Harlem R. R. Co.*, 14 N. Y. (4 Kernan), 310. In this state, also, there can be no recovery if deceased was killed by the negligence of a fellow servant: *Sammon v. New York & Harlem R. R. Co.*, 62 N. Y. 251, 12 Am. Ry. Rep. 150.

<sup>5</sup> *Oldfield v. N. York & Harlem R. R. Co.*, 14 N. Y. (4 Kernan), 310.

<sup>6</sup> *Oldfield v. N. York & Harlem R. R. Co.*, 14 N. Y. (4 Kernan), 310.

<sup>7</sup> *Oldfield v. N. York & Harlem R. R. Co.*, 14 N. Y. (4 Kernan), 310; *S. C. 3 E. D. Smith*, 103; *Quin v. Moore*, 15 N. Y. 432; *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. 287; *Ills. Cent. R. R. Co. v. Barron*, 5 Wall. 90; *Barron v. Ills. Cent. R. R. Co.*, 1 Biss. 453; *Chi. & Alton R. R. Co. v. Shannon*, 43 Ill. 333.

maintained, though there be not both a widow and next of kin; either is sufficient.<sup>1</sup>

No allowance or compensation is to be given in such case by the jury for the physical suffering of the deceased, or anguish of mind of the relatives; the measure of damages is wholly compensatory, and no actual proof of particular pecuniary loss need be given.<sup>2</sup>

This statute gives the right to the "wife" only and next of kin, and not to the husband. The husband and wife are not of kin to each other, in a legal sense. The right being a statutory one, is therefore confined within the terms of the statute.<sup>3</sup> So it follows that in an action by the husband, as administrator, for the death of his wife, evidence of the pecuniary loss of service of the husband, occasioned by his wife's death, is not admissible.<sup>4</sup>

In Iowa, under the statute making railroad companies liable for injuries inflicted on one of its servants by the negligence of a co-servant, the statutory right of action for injuries and wrong acts resulting in death, applies as well to servant and co-servant, in reference to injuries inflicted on one by reason of the negli-

<sup>1</sup> *Oldfield v. N. York & Harlem R. Co.*, 14 N. Y. (4 Kernan), 310; *S. C. 3 E. D. Smith*, 103; *Quin v. Moore*, 15 N. Y. 432; *Dickins v. N. Y. Cent. R. R. Co.*, 23 N. Y. 158; *S. C. 28 Barb.* 41; *Tilley v. Hudson River R. Co.*, 24 N. Y. 471; *Green v. Same*, 2 Abb. Ct. App. 277; *S. C. 28 Barb.* 9, and 32 Barb. 52.

<sup>2</sup> *Oldfield v. The N. York & Harlem R. R. Co.*, 14 N. Y. (4 Kernan), 310; *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. (10 Tiffany), 287; *S. C. 47 Barb.* 515. There are decisions, under the Kentucky statute, holding that the plaintiff may elect whether to sue and recover for the pain and suffering of the deceased, or for the pecuniary damage resulting to the beneficiaries by the death. Both damages, however, can not be recovered, and a judgment in one action will bar a recovery in the other: *Hansford v. Payne*, 11 Bush, 380; *Conner v. Paul*,

12 Bush, 144. See *Walters v. C., R. I. & P. R. R. Co.*, 36 Ia. 458; *S. C. 41 Ia.* 71.

<sup>3</sup> *Dickins v. New York Cent. R. R. Co.*, 23 N. Y. (9 Smith), 158; *Lucas v. Same*, 21 Barb. 245; *Green v. H. R. R. R. Co.*, *supra*. See *Worley v. Cin., Hamilton & Dayton R. R. Co.*, 1 Handy (Cin.), 481.

<sup>4</sup> *Dickins v. New York Cent. R. R. Co.*, 23 N. Y. (9 Smith), 158; *Tilley, admr., v. The Hudson River R. R. Co.*, 24 N. Y. (10 Smith), 471. But if there are children, then the injury to them in the loss of training and nurture is akin to pecuniary loss, and may be considered by the jury. It is distinguishable from injury to the feelings; which may not be considered: *Tilley v. The Hudson River R. R. Co.*, *supra*, and *Same v. Same*, 29 N. Y. 252; *McIntyre v. N. Y. Cent. R. R. Co.*, *supra*; *Ills. Cent. R. R. Co. v. Weldon*, 52 Ill. 290.

gence of the other, as to other persons; so that the legal representatives of a deceased servant of a railroad company, whose death is occasioned by the negligence of his fellow servant, may maintain an action under the statute for the negligence and injury, whenever, and under the like circumstances, the deceased servant himself might have maintained an action for the injury, if he had survived.<sup>1</sup>

In an action to recover damages, by the next of kin, against a railroad company, for negligently causing the death of a relative, it is not necessary, under the statute of Pennsylvania, which limits the amount of recovery to the actual pecuniary loss of the plaintiff, to show a legal right in such plaintiff to support or pecuniary aid from the deceased.<sup>2</sup> Nor is it essential to show the precise amount of damages; the jury are to come at that from all the circumstances.<sup>3</sup> But there must be evidence of reasonable expectation of pecuniary benefit from the life of deceased, in case he had survived;<sup>4</sup> and also that, therefore, there has some pecuniary loss resulted to the plaintiff from the death.<sup>5</sup> The action will lie at the suit of the parent for the death of an adult son, where the family relation still existed between them at the time of the injury.<sup>6</sup>

<sup>1</sup> *Philo v. The Ill. Cent. R. R. Co.*, 33 Iowa, 47. But the Missouri statute is held not to alter the common law rule in this respect, as to the negligence of co-servants: *Proctor v. Hannibal & St. Joseph R. R. Co.*, 64 Mo. 112, 9 Am. Ry. Rep. 440.

<sup>2</sup> *Penn. R. R. Co. v. Keller*, 67 Penn. St. 300.

<sup>3</sup> *Penn. R. R. Co. v. Keller*, 67 Penn. St. 300; *Kansas Pac. Ry. Co. v. Cutter*, 19 Kans. 83; *Chi. & N.W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Ewen v. Chi. & N. W. Ry. Co.*, 38 Wis. 613; *Burton v. Wilmington & Weldon R. R. Co.*, 82 N. Car. 504.

<sup>4</sup> *Penn. R. R. Co. v. Keller*, 67 Penn. St. 300.

<sup>5</sup> *Penn. R. R. Co. v. Keller*, 67 Penn. St. 300. It may be shown, in this connection, in the case of collateral kindred, that they were supported by the deceased: *Chicago & N. W. R. R.*

*Co. v. Moranda*, 93 Ill. 302.

<sup>6</sup> *Penn. R. R. Co. v. Adams*, 55 Penn. St. 499; *Penn. R. R. Co. v. Keller*, 67 Penn. St. 300; *North Penn. R. R. Co. v. Kirk*, 90 Penn. St. 15; *S. C. 1 Am. & Eng. R. R. Cas.* 45; *Groff v. Cin. & Ind. R. R. Co.*, 1 Cin. (Superior Ct.), 264; *Franklin v. South Eastern Ry. Co.*, 3 Hurl. & N. 211; *Dalton v. Same*, 4 Com. B. (N. S.), 296. That portion of Sec. 2 of the Act of April 4, 1868, limiting the recovery to five thousand dollars, was not avoided by Art. 3, Sec. 21, of the subsequent constitution of Pennsylvania. The act, under its provisions for that purpose, having been formally adopted by the Pennsylvania Railroad Company, became a part of its charter, and private charters were not affected by the new constitution: *Pennsylvania R. R. Co. v. Langdon*, 92 Penn. St. 21, 1 Am. & Eng. R. R. Cas. 87.

In New York, when the action is for the death of a child, the absence of proof of special pecuniary damage to the next of kin, resulting from the death, does not justify a non-suit, or the directing of a jury to find for the defendant.<sup>1</sup> It is held in New York, in such cases, that the jury are to form an estimate of damages, under the statute giving the action, in view of all the circumstances of the case.<sup>2</sup>

The repeal of the statute giving the right of action, pending a writ of error from a judgment recovered, does not affect the suit. The writ of error does not vacate the judgment.<sup>3</sup>

Under the Massachusetts statute, it is held that a recovery may be had where the injury occurs upon a private track, used by the company with the owner's consent.<sup>4</sup>

Under the Missouri statute, entitled "An act for the better security of life, property and character," enacted in 1855, it is substantially provided that when any person dies from an injury resulting from the negligence, unskillfulness or criminal intent of any officer, agent, servant, or employe, while running or managing any locomotive, car, or train of cars, and when any passenger shall die from an injury resulting from a defect or insufficiency of a railroad, or any part thereof, or any locomotive or car, the corporation or person owning the same, and in whose employ any such officer, agent, servant, or employe, shall be at the time such injury is committed, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars; that the same may be sued for and recovered by the husband or wife of the deceased; and that the defense may show that the defect or insufficiency was not a negligent one. It is held in said state that the representatives of a servant so killed may maintain the action, if the death result from the negligence, unskillfulness or criminal intent of a fellow servant; and the burden of proof is on the plaintiff to show the negligence.<sup>5</sup>

<sup>1</sup> *Ihl v. The Forty-second Street, etc.*, R. R. Co., 47 N. Y. (2 Sickels), 317.

<sup>2</sup> *Ihl v. The Forty-second Street, etc.*, R. R. Co., *supra*; *O'Mara v. Hudson River R. R. Co.*, 38 N. Y. 445; *Dickens v. N. Y. Cent. R. R. Co.*, 1 Abb. Ct. App. 504; *Cornwall v. Mills*, 44 N. Y. Superior, 45; *Grotenkemper v. Harris*, 25 Ohio St. 510; *City of Chicago v.*

*Scholten*, 75 Ill. 468; *Rockford, Rock Isl. & St. L. R. R. Co. v. Delaney*, 82 Ill. 198.

<sup>3</sup> *Kansas Pacific Ry. Co. v. Twombly*, 3 Col. 125, 21 Am. Ry. Rep. 447.

<sup>4</sup> *Commonwealth v. Boston & Lowell R. R. Co.*, 126 Mass. 61.

<sup>5</sup> *Schultz v. Pacific R. R. Co.*, 36 Mo. 13. And so it is held that, under the

In Wisconsin an action lies by statute for the death of a married person, and is to be brought in the name of the executor or administrator; and the recovery is for the benefit of the husband or wife, as the case may be, if living.<sup>1</sup>

The Alabama act entitled "An act to prevent homicides," of February 21, 1860, repealing Secs. 1938 and 1939 of the Code of 1852, was omitted from the Revised Code of 1867, and the repealed sections inserted in its place. Subsequently, however (February 21, 1872), an act of the same title was passed to remedy the omission. It is held, therefore, that Sec. 1941 of the Code of 1852 (being Sec. 2300 of the Revised Code), giving the same remedy against corporations for wrongful acts causing death as the preceding sections gave against individuals, now gives the remedy provided by the amending act of 1872.<sup>2</sup>

In Tennessee, no damages are recoverable simply for the death of a person;<sup>3</sup> nor for injuries resulting in death, if the death be instantaneous.<sup>4</sup> In cases where death ensues, but not instantaneously, by reason of, or after the infliction of, a personal injury, where the circumstances are such that the deceased could have maintained an action for the injury suffered, had he lived, the administrator may maintain the action in his stead; but the recovery, if any, is for the benefit of the widow and children. The right of action survives to the administrator.<sup>5</sup> But nothing

second section or clause of said act in relation to passengers, an action will lie for the death of a passenger under proper circumstances; but that there the deceased being guilty of negligence by being in the baggage car when he was injured, therefore no action would lie: *Higgins v. Hannibal & St. Joe R. R. Co.*, 36 Mo. 418. But the foregoing case of *Schultz v. Pacific R. R. Co.* was overruled in *Connor v. Chicago, Rock Island & Pacific R. R. Co.*, 59 Mo. 235, 8 Am. Ry. Rep. 417, and another construction given to the statute, in accordance with the common law rulings as to the liability of companies for injuries to servants from the negligence of co-servants. And see, to same effect, *Proctor v. Hannibal & St. Joseph R. R. Co.*, 64 Mo. 112,

9 Am. Ry. Rep. 440.

<sup>1</sup> *Whiton, admr., v. Chicago & Northwestern Ry. Co.*, 21 Wis. 305, 308.

<sup>2</sup> *Savannah & Memphis R. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.

<sup>3</sup> *The Louisville & Nashville R. R. Co. v. Burke, admr., et al.*, 6 Cold. 45. See *Goodsell v. Hartford & New Haven R. R. Co.*, 33 Conn. 51, and *ante*, p. 1135, as to the Connecticut statute.

<sup>4</sup> *The Louisville & Nashville R. R. Co. v. Burke, admr., et al.*, 6 Cold. 45. This case, as to this point, is expressly overruled in *Same Co. v. Conner*, 58 Tenn. (2 Baxter), 382, 21 Am. Ry. Rep. 194, and *Nashville & Chattanooga R. R. Co. v. Prince*, 2 Heisk. 587.

<sup>5</sup> *The Louisville & Nashville R. R.*

is allowable for loss of the widow or heirs caused by reason of the death.

Corporate bodies are alike subject, as natural persons are, to general laws for the protection of the quiet, comfort, safety and health of the people, unless exempt by provision of their charters;<sup>1</sup> consequently, for omission to obey such laws, they will be liable, if injury flow from such omission, although the injured party be in some degree guilty of negligence which contributes to causing the injury;<sup>2</sup> and such negligence of the injured party may be shown in diminution of damages.<sup>3</sup> But if compliance with the law by the company be proven, then negligence on the part of the plaintiff or injured person is a bar to the action.<sup>4</sup>

By section 1169 of the Code, the burden of proof is expressly put upon the defendant to prove that it has complied with section 1166, *et sequens*, relating to requirements for the prevention of accidents, and necessarily that it had all requisite means to be thus employed;<sup>5</sup> and this, it is said, is but in affirmance of the common law rule, that the killing being proved, the *onus* is upon the defendant to clear itself of negligence.<sup>6</sup> An instruction in regard to such statutory requirements, which is no broader than the letter of the statute, is good.<sup>7</sup> A slight increase of danger to passengers will not excuse the omission to comply

Co. v. Burke, admr., *et al.*, *supra*. By Section 2291 of the Code, the personal representative is given an action, and may recover for the mental and bodily suffering of the deceased, loss of time, necessary expenses, etc., and also damages resulting to the beneficiaries; but for grief and mental suffering of the latter, no damages can be recovered: Nashville & Chattanooga R. R. Co. v. Stevens, 9 Heisk. 12, 19 Am. Ry. Rep. 363; Collins v. East Tenn., Va. & Ga. R. R. Co., 9 Heisk. 841, 20 Am. Ry. Rep. 46.

<sup>1</sup> Louisville & Nashville R. R. Co. v. Burke, admr., *et al.*, 6 Cold. 45.

<sup>2</sup> Louisville & Nashville R. R. Co. v. Burke, admr., *et al.*, 6 Cold. 45. See Boston, Concord & Montreal R. R. Co. v. State, 32 N. H. 215; South Western R. R. Co. v. Paulk, 24 Ga.

356.

<sup>3</sup> Louisville & Nashville R. R. Co. v. Burke, admr., *et al.*, 6 Cold. 45; Smith, admr., v. The Nashville & Chat. R. R. Co., 6 Cold. 589; Louisville & Nashville R. R. Co. v. Conner, 58 Tenn. (2 Baxter), 382, 21 Am. Ry. Rep. 194.

<sup>4</sup> Louisville & Nashville R. R. Co. v. Burke, admr., 6 Cold. 45, 51. So also, if the injury be the result of the willful act of the person injured: *Ib.*

<sup>5</sup> Louisville & Nashville R. R. Co. v. Connor, 9 Heisk. 19, 14 Am. Ry. Rep. 368. This section does not apply as between the company and their employes about their yards and stations: Same v. Robertson, 9 Heisk. 276, 20 Am. Ry. Rep. 9.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*



with such requirements, and employes will not be allowed to give their opinion to that effect, without clearly defining the nature and extent of the danger incurred.<sup>1</sup> The omission to observe the statutory precautions will render the defendant liable, *ipso facto*, even though the jury find the accident would have happened had they been observed.<sup>2</sup>

Section 2291 of the Code, before referred to, giving the right of action to the personal representative for the benefit of the widow and next of kin, and section 2292, providing that if the personal representative decline to institute the action, the widow and children might use his name in bringing suit, were subsequently amended by Act of 1871, Ch. 78, by giving the right of action to the widow, or in case there was none, to the children or personal representative, for the benefit of the widow or next of kin. A suit was brought by a widow under this statute for the death of her husband, occurring more than two months before its passage. It was objected that she could not maintain the action. The court held that the objection should have been made *in limine*; that as the facts appeared upon the face of the declaration, it should have been taken by demurrer; and as the effect of making and sustaining the objection at the trial would be to defeat the action by limitation, they would be slow to entertain it.<sup>3</sup> While recognizing the general rule that all statutes operate prospectively unless they import upon their face a retrospective operation, they hold that the law in question is not retrospective in a constitutional sense.<sup>4</sup> The rule that a vested right of action is property, and is protected from such legislation, applies, it is said, to rights of action arising *ex contractu*, or from the common law, and does not apply to the right to a particular remedy. Over the subject of remedies the state has supreme control, and may alter them at pleasure, or give cumulative remedies, without infringing this prohibition against retrospective laws.<sup>5</sup> The act was intended to meet cases where there was no likelihood of administration, and to apply to causes

<sup>1</sup> *Ibid*; Hill v. Louisville & Nashville R. R. Co., 9 Heisk. 823, 19 Am. Ry. Rep. 400.

<sup>2</sup> *Ibid*, and Hill v. L. & N. R. R. Co., L. & N. R. R. Co. v. Robertson, Collins v. E. T., V. & G. R. R. Co., *su-*

*pra*.

<sup>3</sup> Collins v. East Tenn., Va. & Ga. R. R. Co., *supra*.

<sup>4</sup> *Ibid*.

<sup>5</sup> *Ibid*.

of action arising under the code, but was not, for that reason, retrospective in the sense of the constitution.<sup>1</sup> Whether the action be brought by the widow or administrator, the children are not necessary parties.<sup>2</sup> The recovery inures to the benefit of the widow and children, and is distributed as personal property.<sup>3</sup>

In actions for personal injuries, evidence of the pecuniary status of the parties, as to wealth or poverty, is not ordinarily proper to go to the jury;<sup>4</sup> nor the fact of the injured person's dependence on his personal labor for a living or means of support.<sup>5</sup>

To justify the finding of exemplary damages, there must be evidence of fraud, violence, malice, or oppression, commingled with wrong acts of the defendant.<sup>6</sup> It is not the duty of railroad companies to afford personal service of nursing for sick persons traveling on their trains; such persons are bound to provide their own attendants.<sup>7</sup>

Under the Texas statute, which gives a right of action to "the heirs, representatives or relations" of the deceased, it is *held* that suit may be brought by a guardian of minor children. It is not material whether suit is brought in the name of the guardian for the ward, or in the name of the ward by his guardian.<sup>8</sup> The second section of the act provided "every such action shall be for the sole and exclusive benefit of the surviving husband,

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* In that state, if one of several companies forming a continuous line, by agreement with the others, sells through tickets over the entire route, it will be regarded as the agent of the others; and the selling company may, by contract either express or implied, become liable over the entire route. But the sale of the ticket merely will not establish such liability, or cast upon the defendant the burden of proving an express limitation of liability—*secus*, if a partnership be proved: *Nashville & Chattanooga R. R. Co. v. Sprayberry*, 9 Heisk. 852, 20 Am. Ry. Rep. 55.

<sup>4</sup> *Shea v. Portrero & Bay View R. R. Co.*, 44 Cal. 414; *Conant v. Griffin*, 48

Ill. 410; *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205. But see *contra*, *Louisville, Cincinnati & Lexington R. R. Co. v. Mahony*, 7 Bush, 235.

<sup>5</sup> *Shea v. Portrero & Bay View R. R. Co.*, 44 Cal. 414; *Malone v. Hawley*, 46 Cal. 409. See *Ballou v. Farnum*, 11 Allen, 73; *Shaw v. Boston & Worcester R. R. Co.*, 8 Gray, 45; *Balt. & Ohio R. R. Co. v. Shipley*, 31 Md. 368; *Penn. R. R. Co. v. Books*, 57 Penn. St. 339.

<sup>6</sup> *New Orleans, Jackson & Great N. R. R. Co. v. Statham*, 42 Miss. 607.

<sup>7</sup> *New Orleans, Jackson & Great N. R. R. Co. v. Statham*, 42 Miss. 607.

<sup>8</sup> *Houston & Tex. Cent. Ry. Co. v. Bradley*, 45 Tex. 171, 13 Am. Ry. Rep. 213.

wife, child, or children, \* \* \* and may be brought by such entitled parties, or any one of them; and if such parties fail, for three calendar months, to institute suit, then it shall be the duty of the executor or administrator of the deceased," etc.—*held*, that this section did not limit the right to sue, after three months, to the administrator or executor.<sup>1</sup> Nor is the right of the children to share in the damages made dependent upon the contingency that the surviving husband or wife fail to bring suit within three months. The action, by whomsoever brought, is for the benefit of all named.<sup>2</sup>

The widow, having compromised her right to damages, is not a necessary party to such suit by the guardian.<sup>3</sup> The mother, as natural guardian, can not control or manage the property of the child, and therefore can not compromise or settle such claim for damages in favor of the children.<sup>4</sup> And where the widow has compromised her individual claim for damages by instrument in writing, parol evidence of her contemporaneous declarations will not be received to show that the settlement was intended to include damages accruing to the children.<sup>5</sup> The statute contemplates but one suit, for the benefit of all the beneficiaries.<sup>6</sup>

In Colorado, it is held that the fact that a widow was not entirely dependent upon her husband for support during his lifetime, does not affect her right of recovery under their statute.<sup>7</sup>

**3. The statutory action is local to the state where the injury occurs.**—The right given by statute to the recovery of damages for injuries resulting in death, caused by the wrong act or negligence of a railroad company, its employes and servants, is local in its nature, and can only be enforced in the courts of the country or state wherein the right is given by statute, and the injury is incurred.<sup>8</sup> To enable the administrator or executor of the de-

<sup>1</sup> *Ibid.*

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Houston & Tex. Cent. Ry. Co. v. Moore*, 49 Tex. 31; *Galveston, H. & S. A. R. R. Co. v. LeGierse*, 51 Tex. 189.

<sup>7</sup> *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Col. 1, 162.

<sup>8</sup> *Whitford, adm'r, v. The Panama R. R. Co.*, 23 N. Y. 465; *Vanderwerken v. New York & New Haven R. R. Co.*, 6 Abbott's Pr. 239; *Vandevanter v. Same*, 27 Barb. 244; *Beach v. Bay State Steamboat Co.*, 30 Barb. 433; *Crowley v. Panama R. R. Co.*, *Id.* 99; *McDonald v. Mallory*, 77 N. Y. 546; *Woodard v. Michigan Southern & N. Indiana R. R. Co.*, 10 Ohio St. 121; *Richardson, adm'r, v. N. Y. Cent.*

ceased to recover, or such other person as may be by the statute authorized to maintain the suit, the injury must have accrued within the same state wherein the statutory right is given, and the suit is brought; and if the suit be by an administrator or executor, and the proceeds are by law to go to the widow or kindred of the deceased, then it is holden that administration must be granted in the same state where the injury occurred, as the right is not one subject to general administration, and that the suit itself must also be brought where the injury was inflicted.<sup>1</sup>

The legal representatives of the deceased person can not maintain the action in a different state, or under the law of a different state, than the one wherein the injury is inflicted. The right is not one by common law, inuring as of legal result, as incident to the estate, to the administrator, but is a statutory right; so it can only be enforced in that jurisdiction wherein the statute that gives it is itself in force.<sup>2</sup>

If the injury occur in one state, and the suit be brought in another and different state, then there can be no recovery, even if both the states have a similar statute precisely alike; for the action thus brought can not be sustained by virtue of the statute of the state wherein the injury accrued, for the reason that the statute of that state can have no extra-territorial force, and therefore can not be the basis of a recovery in a neighboring

R. R. Co., 98 Mass. 85, 92; *Pickering v. Fisk*, 6 Vt. 102; *Judge of Probate v. Hibbard*, 44 Vt. 597; S. C. 8 Am. R. 396; *McCarthy v. Chicago, Rock Island & Pacific R. R. Co.*, 18 Kans. 46, 9 Am. Ry. Rep. 301. But see, *contra*, *Nashville & Chattanooga R. R. Co. v. Sprayberry*, 9 Heisk. 852, 20 Am. Ry. Rep. 55; *Dennick v. Cent. R. R. Co. of N. J.*, 103 U. S. 11, 1 Am. & Eng. R. R. Cas. 309. The New York statute is held to cover the case of the killing of a citizen of that state upon a vessel belonging to the state, though at the time without the jurisdiction of the state: *McDonald v. Mallory*, *supra*.

<sup>1</sup> *Richardson, adm'r, v. N. Y. Cent. R. R. Co.*, 98 Mass. 85, 92; *Whitford*

*v. The Panama R. R. Co.*, 23 N. Y. 465; *Woodard v. The Michigan Southern & N. Indiana R. R. Co.*, 10 Ohio St. 121. And the petition or declaration must state the names of the next of kin of the deceased, and their relationship to him, in cases where the recovery is for their benefit. It must aver that there are next of kin, and name them. See *Indianapolis, Pittsburg & Cleveland R. R. Co. v. Keeley's adm'r*, 23 Ind. 133.

<sup>2</sup> *Richardson, adm'r, v. N. Y. Cent. R. R. Co.*, 98 Mass. 85; *Woodard v. Mich. S. & N. Ind. R. R. Co.*, 10 Ohio St. 121; *Whitford, adm'r, v. The Panama R. R. Co.*, 23 N. Y. 465; *McCarthy v. C., R. I. & P. R. R. Co.*, *supra*.

state: And so, on the other hand, for a like want of extra-territorial force of the statute of the state wherein the suit is brought, the action can not be maintained by force of the statute of that state; for such statute not having any force where the injury occurred, can not be the basis of a right of action for such injury, which is in fact an injury only by virtue of the statute of the state where it occurred. In short, each statute law is no law outside of the state of its enactment.<sup>1</sup> The statute giving the right of action for a tort can not be enforced in a neighboring state; and so, in like manner, the statute of the neighboring state where suit is brought can neither give nor enforce an action, extra common law in character, and in the nature of a tort, for that which occurred in a neighboring state, and is only actionable by the local law of the state where it occurred, and because it occurred therein.<sup>2</sup> Its actionable character not flowing from any other legal source but the statute law of the state where the injury occurred, the remedy can not be had outside the territorial jurisdiction of such state, for the reason that its law alone gives the action, and that law has no force beyond the territorial limits of the authority that enacted it.<sup>3</sup>

The case referred to in 23d New York, *Whitford v. The Panama Railroad Company*, was one brought in New York, under the statute of New York, to recover for a death that occurred on the Panama Railroad, in the state of Panama, and, as alleged, was caused by the negligence of the defendants, the Panama Railroad Company. The New York court, DENIO, Justice, to illustrate the rulings of that court in holding that such action would not lie in New York, say: "It would be easy to illus-

<sup>1</sup> *Woodard v. Mich. Southern & Northern Ind. R. R. Co.*, 10 Ohio St. 121; *Mackay v. Central R. R. Co.*, 4 Fed. Repr. 617 (U. S. Cir. Ct., S. Dist. N. Y.). See, *contra*, *N. & C. R. R. Co. v. Sprayberry*, and *Dennick v. Cent. R. R. Co.*, *supra*; and the recent case of *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48, 1 Am. and Eng. R. R. Cas. 314, distinguishing the earlier New York cases, and holding that a right of action exists where the statutes are substantially the same. And see, to the same effect, *Stallknecht v.*

*Penn. R. R. Co.*, 13 Hun, 451.

<sup>2</sup> *Whitford v. The Panama R. R. Co.*, 23 N. Y. 465; *Story's Confl. of Laws*, secs. 18, 20; *United States v. Bevens*, 3 Wheat. 336, 386; *Bank of Augusta v. Earle*, 13 Pet. 519; *Woodard v. Mich. S. & N. Ind. R. R. Co.*, 10 Ohio St. 121.

<sup>3</sup> *Whitford v. The Panama R. R. Co.*, 23 N. Y. 465; *Richardson, adm'r, v. N. Y. Cent. R. R. Co.*, 98 Mass. 85; *Judge of Probate v. Hibbard*, 44 Vt. 595; *S. C. 8 Am. R.* 396.

trate the correctness of these positions by referring to the preposterous results which would follow from a different rule. Suppose the government of New Granada to have enacted that the proprietors of a railroad company should not be responsible for the negligence of its servants, provided there was no want of due care in selecting them; it could not be pretended that its will could be set at naught by prosecuting the corporation in the courts of another state where the law was different.”<sup>1</sup>

And in the same case, DAVIES, Justice, it is said: “The only remaining question to be considered is, whether this action, created by and deriving all its vitality from a statute of this state, can be maintained, when the injury was inflicted without the territorial limits of this state. It is in this view of the case an entirely immaterial question whether the injury was caused by the wrongful act, neglect or default of a natural or artificial person, or whether the artificial person was created by the laws of this state, or that of any other state or foreign country. Keeping in view the proposition, which it is deemed has been established, that no such action could have been maintained at the common law, on what principle is it, that for the act of the defendants, committed in New Granada, they can be made liable, by virtue of the statute of the state of New York, which has no extra-territorial vitality, and is of no effect whatever there?”<sup>2</sup>

In the same case, the same learned judge lays down the rule in the following language: “Suppose a similar transaction to this had taken place in England, and the person on whom the duty safely to transport, rested, had resided there after the passage of the act of 9 and 10 Victoria, and a similar accident had happened, and the administrator had sought his remedy in the courts of this state, happening to find the party liable under this statute within this state: can it be seriously maintained that by virtue of the act of 9 and 10 Victoria, he could recover here? I suppose clearly not; and these illustrations show that the plaintiff can not, in this action, recover by virtue of our statute, for injuries which occurred to his intestate, happening where that statute had no force. It is unnecessary to add, that a statute of a state of this Union has no extra-territorial effect.” The court

<sup>1</sup> 23 N. Y. 465, 474.

<sup>2</sup> 23 N. Y. 480.

then add, that "while all transactions occurring here, or liabilities for acts done here, are to be affected and governed by our local law, no such result follows transactions occurring in a different state or territory where those laws are unknown, where they are entirely inoperative, and where different rules applicable to the subject-matter may prevail."<sup>1</sup>

But to our mind the principle is equally clear, that such action can not be maintained in another state than that in which the act was committed or injury incurred, although both states have statutes on the subject precisely similar; and this conclusion is the unavoidable result of the reasoning of the court in the case above cited, to wit: that the law of the former, when the suit is in a different state than that where the injury was committed, can not give a cause of action, for that it has no force in the state where the injury occurred, and therefore no right could accrue or flow from the injury under such law. And on the other hand, the statute of the state where the act is committed can not be enforced where the trial is had in a different state.

The same learned judge says, in said case, quoting the language of *Crowley v. Panama R. R. Co.*, 30 Barb. 99, of these acts of assembly, that "They are purely *local*, and limited to the sovereignty and domain of the state, and only apply where the subject-matter of the action arose within this state." So SUTHERLAND, Justice, in the case of *Crowley v. Panama R. R. Co.*, *supra*, quoted by the court in *Whitford v. Panama R. R. Co.*, and holding the same doctrine, in speaking of these statutes, says there is nothing which shows that they were intended "to protect the lives of its citizens while out of the state;—nothing to show that they were intended to extend to acts, neglects or defaults, committed or suffered in another state"; and that it must be presumed, as the result of the general principle of territorial limit of political jurisdiction, and of the force of laws, that these statutes are "intended to regulate the conduct of corporations, their agents, engineers, etc., and of other persons, whilst operating or being in this state (New York) only";<sup>2</sup> and that "If a citizen of this state leaves it and goes into another state, he is left to the protection of the law of the latter state."

<sup>1</sup> *Whitford v. Panama R. R. Co.*, 23 N. Y. 480, 481.

<sup>2</sup> 23 N. Y. 483.

Again, many of these acts denounce the same omissions or negligences as criminal, and subject the offenders to prosecution and punishment therefor. In respect to these provisions the New York court say, DAVIES, Justice: "Can it be for a moment argued that the servants of the defendants could be indicted and punished in this state for the wrongful act, neglect or default, by which the plaintiff's intestate lost his life?" "This view of the subject furnishes, in my judgment, a conclusive answer to the claim, that the party guilty of the wrongful act, neglect or default, without the territorial limits of this state, can, under these statutes, be called to an account in our courts, either *civiliter* or *criminaliter*." <sup>1</sup> It is evident, too, that these statutes are not the mere instruments of enforcing the rights which the common law gave for injuries not resulting in death, and that therefore the provisions of the statute are to be regarded as only affecting the remedy, and may be invoked, as the *lex fori*, in a suit in one state for an injury received in another; but the statute creates an entirely new cause of action, unknown to the common law. It provides, not for the devolution of a cause of action which would otherwise die, over to or upon the administrator, but creates a new and original right, which without the statute never could exist. <sup>2</sup>

The case of *Richardson, administrator, v. The New York Cent. Railroad Company*, was an action brought in Massachusetts, by an administrator appointed in Massachusetts, to recover for an injury, resulting in death, upon the defendant's railroad, in the state of New York. There was in force in New York at the time of the injury, and at the time of trial, a statute of that state allowing an action to be maintained by an administrator of a person deceased, who came to his death by reason of negligence or wrong act in the state of New York, in cases where a right of action for the injury would have inured to the deceased, had he lived; and the plaintiff pleaded and relied on

<sup>1</sup> 23 N. Y. 483, 484.

<sup>2</sup> *Whitford v. Panama R. R. Co.*, 23 N. Y. 465, 470; *Judge of Probate v. Hibbard*, 44 Vt. 597; S. C. 8 Am. R. 396; *Richardson, admr., v. New York Cent. R. R. Co.*, 98 Mass. 85, 92. In the case here last cited the doctrine

is declared, and in the following language: that "A succession in the right of action, not existing by the common law, can not be prescribed by the laws of one state to the tribunals of another."



this statute of New York. The court of Massachusetts held, on demurrer, that the action could not be maintained in Massachusetts by a Massachusetts administrator; that the New York statute could not be enforced by such administrator appointed in Massachusetts by the courts of Massachusetts. The demurrer was as follows, viz.: "No action can be maintained in this state, by the plaintiff, under or by reason of any statute law of the state of New York." The Supreme Court of Massachusetts sustained the demurrer, and decided that the action could not be maintained.<sup>1</sup>

HOAR, Justice, in the case here cited from 98 Massachusetts, concludes his opinion, rendering judgment on the demurrer, in the following language: "For the reason, therefore, that the right of action which the New York statute gives to the personal representative of the deceased in that state is not a right of property passing as assets of the deceased, but is a specific power to sue created by their local law, it does not pass to the plaintiff as administratrix in Massachusetts, and this suit can not be maintained by her."<sup>2</sup> In other words, as we understand the objection, the specific power conferred by the New York statute does not inure to the administrator appointed in Massachusetts, but only to the administrator appointed as such in New York, and acting in that capacity in New York.

The reference to 10th Ohio St. is of a case still stronger in its character, if possible, than are those cases cited from Massachusetts and New York. This was an action brought in the state of Ohio, to recover, against the Michigan Southern & Northern Indiana R. R. Co., for an injury inflicted by negligence within the state of Illinois. The two states had each similar statutes, allowing actions by administrators for injuries resulting in death, and occasioned by such wrong act or negligence as would give a right of action to the deceased in case he had survived. The administration was granted in Ohio, and the plaintiff pleaded and relied, in his declaration, upon the statute of Illinois, the place where the injury was inflicted. On a demurrer to the petition, it was holden that the plaintiff could not recover by the

<sup>1</sup> 98 Mass. 86, 92.

<sup>2</sup> Richardson, admr., *v.* New York Cent. R. R. Co., 98 Mass. 92; Wood-

ard *v.* The Michigan Southern & N. Ind. R. R. Co., 10 Ohio St. 121.

Ohio administrator; but the court declined to decide what the result would be if the action was brought by an administrator appointed in the state of Illinois.<sup>1</sup>

<sup>1</sup>10 Ohio St. 122-124. The case of *Woodard v. The Michigan Southern & Northern Indiana Railroad Company*, involving circumstances where the two states have similar statutes, is so direct to the point involved, that we deem it of sufficient interest to justify us in giving the opinion at length. GHOLSON, Justice: "We see no reason to suppose, from anything contained in the statute of Illinois, upon which the action professes to be founded, that it was intended to operate beyond the limits of that state. General words in statutes must always be construed in view of the territorial limit to the powers of the legislature. The legislature of Illinois did not intend to provide as to acts of negligence not occurring in that state, and did not intend to impose a trust or duty upon officers not appointed or acting under its laws. It is clear, that an effort of the kind, had it been made, could have availed nothing beyond the limits and jurisdiction of that state.

"If the statute of Illinois can have any effect in this state, it must be because the courts of this state adopt the rule it prescribes as proper to settle the rights of the parties. If a statute of Illinois, as to persons or property within its jurisdiction, imposes a trust or duty, or confers a right of a civil nature, and its enforcement is sought in the courts of this state, there may be cases in which both justice and comity would forbid that any objection should be interposed. But the difficulty in this case proceeds from a mistaken assumption, that because a statute of Illinois confers a right of action, and imposes a trust, upon an administrator under the laws of that

state, that an administrator, appointed and acting under the laws of this state, may bring that action and perform that trust.

"We take it to be clear, that no such right of action existed at common law. It is a right of action given by statute, not to the intestate, but to his personal representatives, not as general assets, but as a trust for the widow and next of kin, in respect of a pecuniary loss they are supposed to have sustained. There are serious difficulties in allowing an Ohio administrator to undertake and discharge such a trust conferred by the laws of another state. It would be difficult to maintain that, without legislation, his oath or bond would extend to such a case. The jurisdiction of the court under which he acts, does not extend to trusts to be carried out in pursuance of the laws of other states, for it may well happen that the next of kin, under the law of Illinois, may not be the same persons, or take in the same proportion, as under the law of Ohio. Certainly, to determine who are the *cestui que trusts*, the laws of Illinois must be regarded, and it is therefore the intention of the statute of that state, that the tribunal under which the personal representative, in whom the right of action is vested, and upon whom the trust is imposed, is acting, should administer the trust and distribute the fund among the proper parties. It is more than questionable whether, if an authority in another state should undertake to do so, it would be regarded as a bar to other proceedings in Illinois.

"It may be questioned, whether the petition goes quite far enough to make

We may remark, that not only may the next of kin not be the same as recognized by statute in the two states, as has been suggested, but administration may be obtained contemporaneously in each of such states, and in favor of different persons, one administration procured with intent to enforce the trust in favor of one set of kin, and the other administration intended as a means of enforcing it in favor of the others; as if the mother, by the statute of one state, be designated to receive the money, and the widow be so designated by the statute of the other state. Each of those claimants would be likely to cause administration to be obtained, and suit to be brought within the state whose laws thus favor their respective claims to the money when recovered. Thus it is obvious that the only reasonable and safe rule is to leave the entire matter of administration, suit and distribution of the proceeds, in case of recovery, to the courts of the state wherein the injury occurs, even if state comity might be invoked legally to a contrary course, which we do not conceive to be at all practicable, for however willing a state may be to enforce the penal laws of its neighbor, yet willingness can not confer power; jurisdiction is still wanting.

The case cited from 44 of Vermont, was an action on a guardian's bond. The bond was executed in the state of New Hampshire, and the action thereon was brought in the state of Vermont. The Supreme Court of Vermont, upon demurrer to the declaration, held that no action would lie on such a bond, it being the creature of the statute of New Hampshire, out of the state in which it was given. The court say, PIERPOINT, C. J.: "This bond is purely a creature of the statute law of New Hampshire,

out an action under the statute of Illinois. There should probably be an averment that the act of negligence was such as, under the laws of Illinois, would have given the intestate, had he survived the injury, a right of action. If the action be founded upon the laws of Illinois, any limitation imposed by those laws must be admitted; and it may happen, that an injury of one of two persons engaged in a common employment from an act of negligence on the part of the other, may be a ground for an action

in Ohio, and not in Illinois. It is well known that an exception has been admitted in such cases in Ohio, that does not prevail in other states.

"We do not undertake to decide, whether an administrator appointed under the law of Illinois might, or might not, maintain such an action, for the purpose of recovering the fund to be distributed under the law of Illinois. That case will present very different considerations from the present. We think there was no error, and affirm the judgment." 10 Ohio St. 122-124

taken according to its requirements, and for a purpose specified and declared by such law. What obligation it creates, and what would be a compliance with its provisions, can only be determined by a reference to that law. When its conditions are broken, the remedy, and the mode of enforcing the remedy, are to be found in the same law. When the parties executed this bond, they did it in view of the obligation thereby created under the laws of New Hampshire, and of the method prescribed to enforce the remedy. The whole proceeding was understood and intended to be local in its operation, and to be consummated in that state, and under its laws."<sup>1</sup>

So in Georgia, it is held that an action will not lie in the courts of that state for the death of a person from injury inflicted in another state;<sup>2</sup> that in the absence of a different showing, the common law is presumed to prevail in such other state, by which no action lies;<sup>3</sup> that the Georgia courts can not administer a statute of Georgia to redress an injury received in a different state, nor enforce the statute, if there be one, of such other state, giving the action there;<sup>4</sup> and, therefore, no action lies unless the statutes of both states are alike, and then only as matter of comity.<sup>5</sup>

But there is a subsequent ruling in Georgia to the effect that by comity an action will lie in the courts of that state for a personal injury inflicted in another state, resulting in death, when, by the laws of such other state, an action is given therefor.<sup>6</sup> In the conducting and trial of such action, the courts will be governed by the laws of the tribunal as to the method of procedure; but the rights of the parties as to the merits and cause of action are to be measured and adjudged by the laws of the state wherein the injury occurred.<sup>7</sup> And the declaration must aver that a right of action for such injury is given by the laws of the state wherein the injury was received.<sup>8</sup>

But it is not as a matter of right on the part of a plaintiff, to

<sup>1</sup> Judge of Probate *v.* Hibbard, 44 Vt. 597, 600; S. C. 8 Am. R. 396.

<sup>2</sup> Selma, Rome & Dalton R. R. Co. *v.* Lacey, 43 Geo. 461.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*; Western & Atlantic R. R. Co. *v.* Strong, 52 Ga. 461; Stallknecht *v.* Penn. R. R. Co., 13 Hun, 451;

Nashville & Chattanooga R. R. Co. *v.* Eakin, 6 Coldw. 582. See McDonald *v.* Mallory, 77 N. Y. 550.

<sup>6</sup> Selma, Rome & Dalton R. R. Co. *v.* Lacey, 49 Geo. 106.

<sup>7</sup> Selma, Rome & Dalton R. R. Co. *v.* Lacey, 49 Geo. 106.

<sup>8</sup> Selma, Rome & Dalton R. R. Co. *v.* Lacey, 49 Geo. 106.

be heard in the courts of Georgia in such cases, nor by reason of any recognition by said courts of any extra-territorial force of the statute of a neighboring state, or any obligation thereof within the state of Georgia; it is merely by the comity of states, which the courts of Georgia will maintain, so long as unrestrained by law, and as its enforcement is not contrary to the policy and interests of said state.<sup>1</sup>

In the case here cited from 49 Georgia, *The Selma, Rome & Dalton R. R. Co. v. Lacey*, the cause of action, which was for a personal injury, arose in the state of Alabama, under a statute of that state by which a right of action is given to the personal representatives of the deceased, "when the death of a person is caused by the wrongful act, or omission, of another," if the former could have maintained an action against the latter for the same act or omission, had it failed to have resulted in death. The court held that the action would lie in Georgia by comity.<sup>2</sup>

The right of such action is, in Alabama, by the statute that gives it, limited to one year after the death;<sup>3</sup> and the amount of damages to be recovered can not exceed three years' income of the deceased, and can in no case exceed three thousand dollars, although the three years' income may amount to more than that sum.<sup>4</sup> By a subsequent section of the same act, the right of action is extended to cases of "death caused by the wrongful act, omission, or culpable negligence of any officer or agent of any chartered company, or private association of persons"; and the statute makes such company or association liable in damages therefor, and gives a right of action against such company or association to the same parties, to wit, the personal representatives of the deceased, as is provided for in said section 2297<sup>5</sup>—the result of which, in legal effect, is merely to extend to incorporated companies and private associations the same liability as is imposed upon natural persons by the original act. The recovery in all such cases is limited in amount, as above stated, to the

<sup>1</sup> *Selma, Rome & Dalton R. R. Co. v. Lacey*, 49 Geo. 106; Code of Geo., Sec. 9.

<sup>2</sup> *Selma, Rome & Dalton R. R. Co. v. Lacey*, 49 Geo. 106; Revised Code of Ala., Sec. 2297.

<sup>3</sup> *Selma, Rome & Dalton R. R. Co. v. Lacey*, 49 Geo. 106; Revised Code of

Ala., Sec. 2297.

<sup>4</sup> *Selma, Rome & Dalton R. R. Co. v. Lacey*, 49 Geo. 106; Revised Code of Ala., Sec. 2298.

<sup>5</sup> *Selma, Rome & Dalton R. R. Co. v. Lacey*, 49 Geo. 106; Revised Code of Ala., Sec. 2300.

value of three years' income of the deceased, and can in no case amount to more than three thousand dollars; and the limitation of time in which to bring the action is equally applicable to actions against chartered companies and private associations.<sup>1</sup>

In such actions, the amount recovered goes to the widow of the deceased, if there be one; if no widow, then to the child or children; if there be no child, then it is to be distributed amongst the next of kin of the deceased, as personal property is by law distributed.<sup>2</sup> But the action can not be maintained in their own name, as such, by either of those to whom the fund is, as above stated, to be distributed or to go to; but can be brought only by the personal representative of the deceased<sup>3</sup>—that is, by the executor or administrator.

But this latter ruling in Georgia is clearly against the weight of authority, if indeed it does not stand alone. The law of the state where an injury is received, is the rule of right and liability between the parties to actions growing out of the occurrence.<sup>4</sup> If the injury be inflicted in one state, and the action therefor be brought in another and different state, then on the trial thereof, and in the absence of proper proof as to what the law of the state was where and when the injury occurred, the presumption of law is that the common law there prevailed in reference to the occurrence.<sup>5</sup> In such cases, actions based upon the common law are transitory actions, and may be maintained elsewhere, by the party injured, if prosecuted in person, than in the state

<sup>1</sup> Selma, Rome & Dalton R. R. Co. v. Lacey, 49 Geo. 106.

<sup>2</sup> Selma, Rome & Dalton R. R. Co. v. Lacey, 49 Geo. 106.

<sup>3</sup> Selma, Rome & Dalton R. R. Co. v. Lacey, 49 Geo. 106.

<sup>4</sup> Nashville & Chat. R. R. Co. v. Eakin, admr., *et al.*, 6 Cold. 582; Holland v. Pack, Peck's (Tenn.) Reps. 151; Nashville & Chattanooga R. R. Co. v. Sprayberry, 9 Heisk. 852, 20 Am. Ry. Rep. 55.

<sup>5</sup> Nashville & Chat. R. R. Co. v. Eakin, admr., *et al.*, 6 Cold. 582, 588; Holland v. Pack, Peck's (Tenn.) Reps. 151. In Tennessee, an action may be brought on the statute of an-

other state. In such case, the plaintiff should allege that the right of action accrued in the foreign state, and that, under its laws, he is entitled to recover in their courts, and aver the statute: Hobbs v. Memphis & Charleston R. R. Co., 9 Heisk. 873, 19 Am. Ry. Rep. 381; N. & C. R. R. Co. v. Sprayberry, *supra*. Under the Code, judicial notice is taken of all foreign laws: Hobbs v. M. & C. R. R. Co., *supra*. It is not necessary to allege the accident occurred in the state where suit is brought; if the accident occurred in another state, it may be shown in defense: *Ibid*.

where the injury occurred.<sup>1</sup> But in case of his death, it can not be maintained, as merely for the death, in a different state, by his administrator, either at common law or under statutory right; for at common law no action lies for the death of a person, and therefore none can survive or inure to the administrator, and a statute of either state, giving an action, being in force only in such state, can not be administered in such action both as to the right and as to the remedy.<sup>2</sup> That is to say, the court of the state where the action is brought can not enforce the right of action by virtue of a statute of the state where the injury occurs, giving a right of action for the death of a person; and the statute, if there be one, of the state where suit is brought, conferring such right of action, can only apply to causes of action arising, or injuries incurred, within the jurisdiction of such latter state. So that the law giving the right of action is not in force in the state wherein the action is brought, and the law of the state where the action is brought, though it may confer a right of action other than as at common law, can not govern the case before the court, which is predicated on an injury received in a different state, and where the law of the trial tribunal or forum is not in force.<sup>3</sup> If, however, the action be upon an alleged statutory right, and it be made to appear that the statutes of each state in that respect are alike, then the court, in the case above cited from 6 Coldwell, decline to decide whether the action would or would not lie in a different state.<sup>4</sup>

From all which it results, that so far as these Tennessee adjudications go, it is settled in that state, that an action therein by an administrator, for the use and benefit of the widow and children, predicated on an injury resulting in the death of a decedent, and incurred in a different state, can not be maintained; and that to such action a plea in bar that the injury occurred in

<sup>1</sup> Nashville & Chat. R. R. Co. v. Eakin, *supra*; Holland v. Pack, *supra*.

<sup>2</sup> Nashville & Chat. R. R. Co. v. Eakin, *supra*; Holland v. Pack, *supra*.

<sup>3</sup> Nashville & Chat. R. R. Co. v. Eakin, admr., *et al.*, 6 Cold. 582; Holland v. Pack, Peck's (Tenn.) Reps. 151.

<sup>4</sup> Nashville & Chat. R. R. Co. v. Eakin, admr., *et al.*, 6 Cold. 582, 587, 588. But it is held that it will lie by other authorities: Stallknecht v. Penn. R. R. Co., 13 Hun. 451; Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48; S. C. 1 Am. & Eng. R. R. Cas. 314; Western & Atlantic R. R. Co. v. Strong, 52 Ga. 461.

a different state, is good, and will defeat the action, if sustained by proof.<sup>1</sup>

4. **Indictment for, under the statute, to recover penalty.**—In some of the states an indictment lies, by statute, for a limited penalty, for wrongfully causing the death of a person.<sup>2</sup>

In Massachusetts, by statute of 1840, ch. 80, it is provided that if the life of a passenger shall be lost by the negligence of the proprietors of a railroad, steamboat, etc., or of their servants or agents, such proprietors shall be liable to a penalty not exceeding five thousand dollars, nor less than five hundred dollars, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for the benefit of his widow and heirs.<sup>3</sup> In an indictment under the Massachusetts statute, it must be averred and proved that the deceased was a passenger, and that his death was occasioned by the negligence of the railroad company (if the death occurred on a railroad), its servants or agents;<sup>4</sup> and an agreement in the sale of the ticket, or condition thereto annexed, that the company shall be exempt from liability for personal injury, will afford no defense to the company, as against the state in the prosecution of an indictment.<sup>5</sup> The parties are incompetent to suspend the right of the state to enforce its laws, by a contract between themselves.

In an indictment on these statutes, the existence of such persons as are made the beneficiaries of the recovery must be averred.<sup>6</sup>

On the trial of an indictment against a railroad company for negligently causing the death of a person, it is holden that the same rules and principles of law are to govern, in the trial, that are applicable in the trial of a civil action at law for injuries to

<sup>1</sup> Nashville & Chat. R. R. Co. v. Eakin, admr., *et al.*, 6 Cold. 582, 588; Holland v. Pack, Peck's (Tenn.) Reps. 151; Cherry v. Slade's admr., 3 Murphey's N. Car. Reps. 94.

<sup>2</sup> Carey and wife v. Berkshire R. R. Co., and Skinner v. Housatonic R. R. Co., 1 Cush. 475; Commonwealth v. Boston & Worcester R. R. Co., 11 Cushing, 512; State v. Grand Trunk R. W. Co., 58 Maine, 176.

<sup>3</sup> Carey and wife v. Berkshire R. R.

Co., and Skinner v. Housatonic R. R. Co., 1 Cush. 475.

<sup>4</sup> Commonwealth v. Vermont & Mass. R. R. Co., 108 Mass. 7.

<sup>5</sup> Commonwealth v. Vermont & Mass. R. R. Co., 108 Mass. 7.

<sup>6</sup> Commonwealth v. Eastern R. R. Co., 5 Gray, 473; Comm. v. Boston & Albany R. R. Co., 121 Mass. 36; State v. Gilmore, 24 N. H. 461; State v. Cons. European & N. Am. Ry. Co., 67 Me. 482.



the person.<sup>1</sup> It is provided by the Revised Statutes of Maine, sec. 42, chapter 51, that "any railroad corporation, by whose negligence or carelessness, or by that of its servants or agents while employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred nor more than five thousand dollars, to be recovered by indictment, found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally; if neither, to his heirs."<sup>2</sup> It is also held, KENT, Justice, that the object of the statute is to obviate the common law doctrine, under which there is no remedy in a civil action for taking human life; that the design of the statute is to enable the heirs or family of the deceased to recover for their own use damages, within a limited amount, for the loss of his life; and that therefore the same principles of law will govern a trial on such indictment, that would govern if trying a civil suit for injury, in case the person had simply lost a limb, or suffered other injury, and surviving the same, had brought suit in his own name. In that case the learned judge says: "We are satisfied that in all this class of cases, where the statute has attempted to supply the supposed defect of the common law, as before explained, the same rules of evidence, and the same principles of law should be applied, as in like cases when redress is sought by a civil action for damages."<sup>3</sup>

A railroad company is not bound, at any way station between the points from which and to which a passenger is going, to furnish egress and ingress for such passenger to and from the cars, and more especially so when the stoppage is upon a side track, awaiting the passage of another train. When a train stops at a station to discharge and receive passengers belonging to such station, the company is bound to extend to such passengers convenient and suitable egress and ingress to and from the cars, and to allow a reasonable time for the same. The other passengers may leave the cars also, unless notified not to; but if they do, it must be to a certain extent, as to the usual modes of egress and ingress, at their own risk. The cars are the place of safety. If, however, no objection be made or notice given against leav-

<sup>1</sup> State v. Grand Trunk R. W. Co., 58 Maine, 176, 180; S. C. 4 Am. R. 258, 58 Maine, 176; S. C. 4 Am. R. 258.

<sup>3</sup> 58 Maine, 176, 182.

<sup>2</sup> State v. Grand Trunk R. W. Co.,

ing, and a passenger who thus ought not to leave does leave, he does not thereby do any illegal act, but he for the time surrenders his place, and assumes, for the time being, the direction and responsibility of his own conduct or motions. He may also return to his place in the train before it starts. But if while thus absent he be killed, by negligence or otherwise, he is killed as an ordinary person, and not as a passenger.<sup>1</sup>

An indictment under the statute of Maine, above referred to, must not only aver the death of the decedent, and the negligence of the railroad company in respect to it, and the observance of care on the part of the deceased, but must also aver and state that the deceased left a widow or children, or both, as the case may be, or, in the absence of both, then such other heirs as for whose benefit the action will lie in law; and must set out their names.<sup>2</sup> A statement that "their names are to the jurors unknown," is not sufficient under the statute.<sup>3</sup> Nor is it enough to aver that "there is now living a widow and one child"; for there may also be another child, or other children. So there may have been other children living at the death of the deceased, and who, dying since, left issue entitled to their share. And so, likewise, it is insufficient to say, he "then and there having a lawful wife and child alive."<sup>4</sup> The averments should keep closely to the language of the statute, and should give the names and relationship to the deceased of the persons who are to receive the benefit of the forfeiture;<sup>5</sup> for if there be a conviction, the judgment must follow the indictment. No fine or judgment can be

<sup>1</sup> *State v. Grand Trunk R. W. Co.*, 58 Maine, 176; S. C. 4 Am. R. 258.

<sup>2</sup> *State v. Grand Trunk R. W. Co. of Canada*, 60 Maine, 145; *Comm. v. Boston & Worcester R. R. Co.*, 11 Cush. 512; *Indianapolis, Pittsburg & Cleveland R. R. Co. v. Keely's adm'r.*, 23 Ind. 133; *Jeffersonville, Mad. & Ind. R. R. Co. v. Hendricks*, 41 Ind. 48; *Chi. & Rock Island R. R. Co. v. Morris*, 26 Ill. 400; *State v. Manchester & L. R. R. Co.*, 52 N. H. 528; *Louisville, Cin. & L. R. R. Co. v. Case*, 9 Bush, 728. See, also, *Claxton v. Lexington & Big Sandy R. Co.*, 13 Bush, 636; *Cincinnati,*

*Hamilton & Dayton R. R. Co. v. Chester*, 57 Ind. 297. But see, holding it unnecessary to allege the observance of due care by the deceased: *State v. M. & L. R. R. Co.*, *supra*; *Balt. & Ohio R. R. Co. v. Whittington*, 30 Gratt. 805.

<sup>3</sup> *State v. Grand Trunk Ry. Co. of Canada*, 60 Maine, 145.

<sup>4</sup> *State v. Grand Trunk R. W. Co.*, 60 Maine, 145; *Comm. v. Eastern R. R. Co.*, 5 Gray, 474; *Comm. v. Messenger*, 4 Mass. 462.

<sup>5</sup> *State v. Grand Trunk R. W. Co.*, 60 Maine, 145.

imposed in favor of the state, but the same must be rendered in favor of the persons entitled to it; and if they be not named in the indictment, and found to be such by the verdict, in legal effect, then no judgment can be rendered.<sup>1</sup> A judgment giving the penalty to the widow, or widow and children, as the case may be, of the deceased, would be too indefinite and uncertain to have any legal effect, without the introduction of testimony, so that an issue of fact might still be involved. There must be a formal averment in the indictment, setting out the names of the beneficiaries, and their relationship to the deceased.<sup>2</sup> In this case the court say, DANFORTH, Justice: "By giving the whole of the penalty to individuals, the legislature has made the prosecution as much a private matter as a public one. If those who are to receive the penalty make no claim to it, none can be enforced. If they do claim it, it is quite as easy for them to make known their names as their right. In public prosecutions where the penalty goes to the state, the judgment is in favor of the state; where it goes to an individual, the judgment must be in favor of that individual; but no judgment can be rendered in favor of an unknown person."<sup>3</sup>

Moreover, to become the foundation of an indictment under this statute, the death must have been instantaneous, and the indictment must so charge.<sup>4</sup> If the injury does not produce immediate death, a right of action therefor accrues to the injured person, if produced by the negligence of the railroad company, and he himself be observing suitable care to avoid injury at the time; and in case of his subsequent death, such right of action survives (where by statute there is such survivor) to his personal representatives. In such a case an indictment will not lie;<sup>5</sup> the remedy then is by action in favor of the legal representatives. In the case cited from page 114 of 61 Maine Reports, the court say, WALTON, Justice: "the evidence shows clearly and beyond a reasonable doubt, that Pullen, the person injured, did not die

<sup>1</sup> State v. Grand Trunk R. W. Co., 60 Maine, 145; Howard v. Comm., 13 Mass. 221.

<sup>2</sup> State v. Grand Trunk R. W. Co., 60 Maine, 145.

<sup>3</sup> State v. Grand Trunk R. W. Co., 60 Maine, 145, 153.

<sup>4</sup> State v. Grand Trunk R. W. Co., 61 Maine, 114; State v. Maine Cent. R. R. Co., 60 Maine, 490.

<sup>5</sup> State v. Grand Trunk R. W. Co., 61 Maine, 114; State v. Maine Cent. R. R. Co., 60 Maine, 490.

immediately. He not only survived several hours, but during most of the time was conscious, and able to converse intelligently. A right of action, therefore, accrued to him, which, upon his subsequent death, descended to his personal representatives; provided he was himself in the exercise of due care at the time of the injury, and the carelessness of the railroad company, or its servants, was the sole cause of it. This is not, therefore, a case where an indictment can be maintained. The verdict is not only against evidence, but is also contrary to law; and the motion to set it aside must be sustained."<sup>1</sup> In Massachusetts, however, the ruling under a similar statute is different as regards the remedy by indictment. It is held in that state that the remedy by indictment is not restricted to cases where the death is instantaneous, but applies also to cases where the death is not immediate upon the infliction of the injury;<sup>2</sup> that the object of the statute is to inflict punishment, as well as to secure compensation to the family of the deceased.<sup>3</sup>

The statute of Maine is held, by the Supreme Judicial Court of that state, not to extend to the benefit of employes. In that respect see the language and the reasoning of said court, by WALTON, Justice, in the annexed note.<sup>4</sup>

<sup>1</sup> *State v. Grand Trunk Ry. Co.*, 61 Maine, 114, 115.

<sup>2</sup> *Commonwealth v. Metropolitan R. Co.*, 107 Mass. 236.

<sup>3</sup> *Ibid.*

<sup>4</sup> "Another question is, whether the statute under consideration is applicable to a case where the person killed was, at the time, an employe of the road. We think this question must also be answered in the negative. It is certain that the Act of 1855, which is the basis of the existing law, did not apply to the employes of the corporation. The first section of the act applied only to passengers. The second section of the act applied to persons other than passengers, but expressly excluded the employes of the road. In the revised statutes, these several provisions are crowded into one section of only seven lines, and

the language employed is more general. But there is nothing to lead us to believe that a change of the law was intended. Our conclusion, therefore, is that the existing statute is not applicable to the employes of the road. To hold otherwise, would endanger the safety of travelers. Their safety requires that the persons in charge of a train of cars should be regarded as a unit; that each should feel responsible, not only for his own conduct, but also for the conduct of all the others. They should be made to feel that it is their duty, not only to be watchful of themselves, but to be watchful of each other. And this end will be best secured by making them the insurers of their own safety. Such was the opinion of Chief Justice SHAW. He says that where several persons are employed in the conduct of one

**5. Measure of damages for injuries resulting in death.**—The pecuniary loss suffered by those entitled to the benefit of the recovery is the measure of damages in actions for the death of a person; this is compensation.<sup>1</sup> Nothing is to be allowed for pain or suffering of the deceased, or sympathy or injured feelings of relations.<sup>2</sup> Pecuniary loss is the measure, and this is the sum which the deceased would probably have realized from his labor, profession or business, during his life (for the benefit of those entitled to the proceeds of recovery), taking into consideration the age, health, habits of life, and industry, ability and manner of life; as also expenditures of living, and the amount of his property.<sup>3</sup> In estimating the damages in such cases, and prob-

common enterprise or undertaking, and the safety of each depends much on the care and skill with which each of the others performs his appropriate duty, each is an observer of the conduct of the others, and can give notice of any misconduct, incapacity, or negligence of duty, and leave the service, if the common employer will not take such precautions, and employ such agents as the safety of the whole party requires; that, by these means, the safety of each will be much more effectually secured, than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other. *Farwell v. Railroad*, 4 Met. 59." *State v. The Maine Central R. R. Co.*, 60 Maine, 490, 493, 494.

<sup>1</sup> *Burton v. Wilmington & Weldon R. R. Co.*, 82 N. Car. 504.

<sup>2</sup> But see *Baltimore & Ohio R. R. Co. v. Wightman*, 29 Gratt. 431, 17 Am. Ry. Rep. 351, in which this position seems to be doubted; also *Fowlkes v. Nashville & Decatur R. R. Co.*, 5 Baxt. 663. In Colorado it is held that if the statute prescribe no measure of damages, that ordinarily applicable in like cases at common law will govern: *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245. But the rule of the text is followed.

<sup>3</sup> *Pennsylvania R. R. Co. v. Zebe*, 33 Penn. St. 318; *Pennsylvania R. R. Co. v. Vandever*, 36 Penn. St. 298; *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335; *Mansfield Coal & C. Co. v. McEnery*, 91 Penn. St. 185; S. C. 37 Leg. Int. 28; *Coakley v. N. Penn. R. R. Co.*, 6 Am. Law Reg. 355; *Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind. 366; *Chicago & Alton R. R. Co. v. Shannon*, admr., 43 Ill. 338; *Ill. Cent. R. R. Co. v. Weldon*, 52 Ill. 290; *Ill. Cent. R. R. Co. v. Baches*, 55 Ill. 379; *Chicago & Alton R. R. Co. v. Becker*, 76 Ill. 25; *Chicago, Burlington & Quincy R. R. Co. v. Harwood*, 80 Ill. 88; *Chicago & N. W. R. R. Co. v. Moranda*, 93 Ill. 302; *Lake Shore & Mich. Southern Ry. Co. v. Sunderland*, 2 Bradw. (Ill.), 307; *Telfer v. Northern R. R. Co.*, 1 Vroom (N. J.), 188; *Baltimore & Ohio R. R. Co. v. Wightman*, 29 Gratt. 431, 17 Am. Ry. Rep. 351; *Balt. & Ohio R. R. Co. v. Noell*, 32 Gratt. 394; *Kansas Pacific Ry. Co. v. Cutter*, 19 Kans. 83, 17 Am. Ry. Rep. 471; *Collins v. East Tenn., Va. & Ga. R. R. Co.*, 9 Heisk. 841, 20 Am. Ry. Rep. 46; *Holmes v. Oregon & Cal. Ry. Co.*, 6 Sawyer, 262; S. C. 5 Fed. Repr. 523, 1 Am. & Eng. R. R. Cas. 623; *Little Rock & Fort Smith Ry. Co. v.*

able lifetime of the deceased, well recognized and accredited American life tables may be properly received in evidence to the jury, in connection with evidence of the ordinary state of decedent's health, previous to and at the time of receiving the injury.<sup>1</sup>

In an action by a father, as administrator, under the statute of New York,<sup>2</sup> to recover damages for the death of his minor son, the verdict may include loss of service during minority;<sup>3</sup> but such recovery, however, will be a bar to a separate action by the father for such loss of service.<sup>4</sup> In the latter case it is a question for the jury, where the son is over twenty-one years of age, whether there is a reasonable expectation of pecuniary advantage accruing to the plaintiff, and which is destroyed by the loss of his son.<sup>5</sup> But the defendant will not be permitted to show that plaintiff has received insurance on the life of deceased.<sup>6</sup>

Barker, 33 Ark. 350; *Burton v. W. & W. R. R. Co.*, *supra*; *K. P. Ry. Co. v. Miller*, *supra*; *Kansas Pac. Ry. Co. v. Lundin*, 3 Col. 94; *Denver, S. P. & P. Ry. Co. v. Woodward*, 4 Col. 1, 162. Additional damages to these may be given for the value of the services of deceased in his attention to, and superintendence and care of, his family, and in the education of his children: *B. & O. R. R. Co. v. Wightman*, *supra*. Punitive damages are given by the Alabama statute: *Savannah & Memphis R. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451.

<sup>1</sup> *Alexander's Executrix v. Bradley*, 3 Bush (Ky.), 667; *O'Donnell v. O'Donnell's Execr.*, 3 Bush (Ky.), 216; *Louisville, Cin. & Lex. R. R. Co. v. Mahony's admx.*, 7 Bush (Ky.), 235; *Sauter v. N. Y. Cent. & H. R. R. R. Co.*, 66 N. Y. 50; 6 Hun, 446; *Walters v. C., R. I. & P. R. R. Co.*, 36 Ia. 458; S. C. 41 Ia. 71; *Balt. & Ohio R. R. Co. v. Noell*, *supra*; *Kans. Pac. Ry. Co. v. Lundin*, *supra*; *Denver, S. P. & P. Ry. Co. v. Woodward*, *supra*.

<sup>2</sup> Chap. 450, Laws 1847; Chap. 256, Laws 1849.

<sup>3</sup> *McGovern v. New York Central &*

*Hudson River R. R. Co.*, 67 N. Y. 417, 15 Am. Ry. Rep. 119. In an action by a father in his natural right, such damages are, of course, recoverable, as well as the expenses of the sickness: *Ibid*; *Ewen v. C. & N. W. Ry. Co.*, 38 Wis. 613; *Little Rock & Fort Smith Ry. Co. v. Barker*, 33 Ark. 350. If the child is of tender years, and unable to render any service, it has been held that no pecuniary damage results from its death: *Holleran v. Bagnell*, 6 Law Rep., Irish, 333.

<sup>4</sup> *McGovern v. N. Y. Cent. & H. R. R. R. Co.*, *supra*.

<sup>5</sup> *Penn. R. R. Co. v. Zebe*, 33 Penn. St. 318; *North Penn. R. R. Co. v. Kirk*, 90 Penn. St. 15; S. C. 1 Am. & Eng. R. R. Cas. 45; *Rockford, Rock Island & St. Louis R. R. Co. v. Delaney*, 82 Ill. 198. See *Walters v. C., R. I. & P. Ry. Co.*, 41 Ia. 71; *Balt. & Ohio R. R. Co. v. Noell*, *supra*; *Houston & Tex. Cent. R. R. Co. v. Nixon*, 52 Tex. 19.

<sup>6</sup> *N. Penn. R. R. Co. v. Kirk*, *supra*; *Kellogg v. N. Y. Cent. & H. R. R. Co.*, 79 N. Y. 72; *Bradburn v. Great Western Ry. Co.*, Law Rep., 10 Exch. 1; or that they have thereby become heirs: *Terry v. Jewett*, 78 N. Y. 338;

In an action under the Iowa statute, instituted by the administrator, against a railroad corporation causing the death of his decedent, an infant, the measure of damages is the loss the estate has suffered for the time after the deceased, if living, would arrive at the age of twenty-one years;<sup>1</sup> before that time the parents are entitled to the service and earnings of the child, and the loss, if any, during that period, is their loss, and not that of the child's estate.<sup>2</sup> In the case here cited from 36 Iowa, the Supreme Court of that state say: "in our opinion, the administrator is not entitled to recover for damages accruing prior to the time at which the child would have attained his majority; the father or mother, under Revision, section 2792, is the proper party to an action to recover such damages."<sup>3</sup>

If the action be commenced before the death of the injured person, and in his own name, and after his death be prosecuted by the administrator, instead of his bringing a new action, then the measure of damages is not compensation for pecuniary loss, under the statute giving an action for the death of a person; but where, as in Iowa, the right of action for torts survives the death of the injured person, the administrator may, in such action so kept alive and prosecuted by him, recover only for the amount due decedent at the time of his death, of which a fair compensation for bodily pain and suffering forms a part, as also medical expenses and loss of time. The administrator, in such case, occupies the same position in that respect under the survivorship as the deceased himself would occupy, if living at the time of the recovery.<sup>4</sup>

By the common law, the injured person had a right of action against the company, if not himself to blame, during his lifetime. In that action he also had a right to recover, not only for the injury, but also for bodily pain and suffering. Under the

or the pecuniary condition of the beneficiaries: *C. & N. W. R. R. Co. v. Moranda*, *supra*; *Same v. Howard*, 6 Bradw. (Ill.), 569; *Cent. R. R. Co. v. Moore*, 61 Ga. 151.

<sup>1</sup> *Walters v. Chicago, R. Isld. & Pacific R. R. Co.*, 36 Iowa, 458.

<sup>2</sup> 36 Iowa, 462. See *McGovern v. N. Y. Cent. & H. R. R. Co.*, *supra*.

<sup>3</sup> In such action by the father, evidence is admissible of the father's occupation, as bearing upon the probable character of the business and earnings of the child: *Ibid*, and *S. C.*, 41 Ia. 71.

<sup>4</sup> *Muldowney v. Ill. Cent. Ry. Co.*, 36 Iowa, 462.

statute of Iowa, this right of action survived to his administrator as fully as it ever existed. The administrator can recover for whatever a right of recovery had already accrued to the deceased; and it does not matter that an action is given for the death by another statute, for the benefit of the next of kin, as for their pecuniary loss. The latter, to our mind, will be no bar to the former. Whether, under the Iowa statute, a recovery may be had for both, is not to our knowledge anywhere decided; but if there may be, it should be in separate actions, as the money in the one case becomes assets, and in the other goes exclusively to the next of kin named in the statute, so the two may not be inseparably commingled in one recovery.<sup>1</sup>

When, in an action for personal injury resulting in death, the case is such as may sustain a verdict for punitive damages, then evidence may be given of the pecuniary circumstances of the defendant, as also of the ages and condition of those of the family of the deceased who are entitled to the benefit of the recovery.<sup>2</sup> But punitive damages are only allowable in Kentucky where the injury or negligence is willful.<sup>3</sup> If the death be instantaneous, and results from ordinary negligence only, that is, if the negligence or act be less than willful, then compensatory damages only may be given.<sup>4</sup>

<sup>1</sup> See *Hansford v. Payne*, 11 Bush, 380; *Conner v. Paul*, 12 Bush, 144.

<sup>2</sup> *Louisville, Cincinnati & Lexington R. R. Co. v. Mahony's Admx.*, 7 Bush, 235, 237. But see *contra*, *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205; *Conant v. Griffin*, 48 Ill. 410.

<sup>3</sup> *Louisville, Cincinnati & Lexington R. R. Co. v. Case's admr.*, 9 Bush, 728. And see *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245; *Same v. Lundin*, 3 Col. 94; *Holmes v. Oregon & Cal. Ry. Co.*, 6 Sawyer, 262; S. C. 5 Fed. Repr. 523, 1 Am. & Eng. R. R. Cas. 623; *Matthews v. Warner*, 29 Gratt. 570; *Balt. & Ohio R. R. Co. v. Noell*, 32 Gratt. 394; *Galveston, H. & S. A. R. R. Co. v. Le Gierse*, 51 Tex. 189; *Southern Cotton Press & M. Co. v. Bradley*, 52 Tex. 587.

<sup>4</sup> *Louisville, Cincinnati & Lexington R. R. Co. v. Case's admr.*, 9 Bush, 728. It is otherwise under the Alabama statute: *Savannah & Memphis R. R. Co. v. Shearer*, 58 Ala. 672, 20 Am. Ry. Rep. 451; *South & N. Ala. R. R. Co. v. Sullivan*, 59 Ala. 272. But under the allegation of willfulness, a lesser degree of culpability may be proven and recovered for: *L. & L. R. R. Co. v. Case*, *supra*. It is error, however, to instruct the jury to give damages as they deem proper compensation, not exceeding the amount claimed in the petition; the jury are confined to mere compensation, which is to be ascertained from the value of the decedent's ability, if living, to accumulate or earn money: *Id.*



6. **A claim for damages for, is not assets.**—A claim for damages, under the statute, for the death of a person, is not assets, within the ordinary meaning of the term, as used in reference to the granting of administration upon, and the settlement of, decedent's estates, under the statute.<sup>1</sup> Therefore, where the death of a person is caused and occurs within the state, by or under such circumstances as under the statute gives a right of action to his administrator or legal representative therefor, and for the benefit of the next of kin to the deceased, or some of them, administration is not legally grantable in a county wherein the death has not occurred, and in which decedent left no assets to be administered on at the time of his death, and into which none have come since his decease; there is a want of jurisdiction.<sup>2</sup> Administration thus granted is void, and the court issuing the letters is competent to set aside and cancel the same, either on its own motion, or on application of any one else interested or appearing so to do as *amicus curiæ*.<sup>3</sup> The interest of a railroad corporation in the matter in controversy, in a suit brought by an administrator against it for damages, under the statute, for the death of a person, is such an interest as will entitle the company to prosecute proceedings to test the legality and validity of the administrator's appointment and letters of administration, and to cancel and set the same aside;<sup>4</sup> for if such letters be illegal and void, for want of jurisdiction, a settlement of the matter involved in the action will not shield the company from liability for the same subject-matter to the real or legal administrator, if one be appointed.<sup>5</sup> And *quære*, if the validity thereof can be tested collaterally, as a plea or defense to the action. The plea of *ne unques administrator* would be sufficiently met by the production of the letters, and the order of court granting them (if indeed the latter be necessary); and the adjudication of the probate court, involving the question of fact as to assets or

<sup>1</sup> Jeffersonville R. R. Co. v. Swayne's admr., 26 Ind. 477, 483. But see, under the Oregon statute, Holmes v. Oregon & Cal. Ry. Co., 6 Sawyer, 262; S. C. 5 Fed. Repr. 523, 1 Am. & Eng. R. R. Cas. 623.

<sup>2</sup>The Jeffersonville R. R. Co. v. Swayne's admr., 26 Ind. 477, 483.

<sup>3</sup>The Jeffersonville R. R. Co. v.

Swayne's admr., 26 Ind. 477.

<sup>4</sup>The Jeffersonville R. R. Co. v. Swayne's admr., 26 Ind. 477, 480.

<sup>5</sup>The Jeffersonville R. R. Co. v. Swayne's admr., 26 Ind. 477, 481; Cutts v. Haskins, 9 Mass. 543; Holyoke v. Haskins, 9 Pick. 259; Wright v. Beck, 10 Smedes & M. 277.

residence, might not be overturned except on appeal, or a direct proceeding instituted for that purpose before the same court. It could not be set aside collaterally.<sup>1</sup>

The right of action for the bodily injury of the deceased dies with him, and is extinct, ordinarily—that is, if there be no statute causing survivor of actions for torts; and the right given by the “statute is founded on a new grievance, namely, causing the death.” Though recoverable in the name of the administrator, they do not become assets. He does not, as holder thereof, represent the deceased or his estate; but is a trustee for the benefit of the widow and next of kin, as the case may be, who are, under the statute, the recipients. The reference in the statute to the “ability of the deceased” to have maintained an action, “if death had not ensued,” is descriptive only of the kind and degree of wrong with which the defendant must be chargeable in order to subject the defendant to this action, and to enable the administrator to maintain the same.<sup>2</sup> The meaning clearly is, that if the wrong act be such as the deceased could have maintained an action for, in case he had lived, then if, by reason of such wrong act, death ensue, the personal representative has an action—not for the wrong act, but for the death.

But, in some of the states, the right of action in respect to torts is made to survive, as well for personal injuries as others; and in some, if not all thereof, this right of action in the representative is given for the death. In the one case, the recovery would vest as assets in the estate, for in that respect the administrator recovers what was already due the deceased at his death; the personal right thereto was vested in him. In the other, the recovery is for a new right, created by the law, and which only begins to exist coterminously with the death. *Quære*, does the latter extinguish or supersede the former, or is the delinquent party liable to both?

**7. Pleadings and evidence, in actions for personal injuries causing death.**—The declaration or petition of the plaintiff, in actions for negligently or wrongfully causing the death of a person, should not only set forth the injury and death of the person, and the manner of inflicting the same, with suitable alle-

<sup>1</sup> *Jeffersonville R. R. Co. v. Swayne's admr.*, 26 Ind. 477; *Holmes v. Oregon & Cal. Ry. Co.*, *supra*.

<sup>2</sup> *Jeffersonville R. R. Co. v. Swayne's admr.*, 26 Ind. 477, 485.

gations of wrong or negligence of the defendant, and of ordinary care on the part of the deceased,<sup>1</sup> but should also aver and state all such facts and circumstances as are necessary to bring the case within the purview and terms of the statute, both as to the liability of the defendant, and as to the right of the plaintiff to sue, and also the existence of such persons as by the statute are made the beneficiaries of the recovery; and, as recovery must be by a correspondence of the allegations and the proof, it follows that all necessary allegations must be proven. These principles will be sufficiently illustrated by the following references.<sup>2</sup>

The ruling in *Kentucky* is, that in actions for negligently causing the death of another, it is not enough that the petition or declaration charges the defendant with negligently causing the death of the deceased;<sup>3</sup> but it must state how, or by what means, he caused it, and such circumstances as in law render the act or omission negligent, which is alleged to have caused the injury.<sup>4</sup> It is sufficient, however, to state the facts; facts, and not evidence, are to be pleaded.<sup>5</sup>

To sustain an action for the death of a person, under the statute of Illinois, it is not only necessary that there be in existence such persons as are to be the beneficiaries thereof, and that their existence be averred in the declaration or petition, as we have seen, but it must be made to appear that the cause comprises all the ingredients which are necessary to a recovery, and that the same be alleged—that is to say, wrongful act of defendant, or neglect or fault of defendant, causing the death of the deceased, and under such circumstances as would have given

<sup>1</sup> But see *Balt. & Ohio R. R. Co. v. Whittington*, 30 Gratt. 805.

<sup>2</sup> *Chicago & Rock Island R. R. Co. v. Morris et als.*, admr., 26 Ill. 400; *Chicago & Alton R. R. Co. v. Shannon*, 43 Ill. 346; *Quincy Coal Co. v. Hood*, admr., 77 Ill. 68; *Vanderslice v. Newton*, 4 N. Y. 130; *Earhart v. N. Orleans & Carrollton R. R. Co.*, 17 La. An. 243; *Louisville, Cin. & Lex. R. R. Co. v. Case's admr.*, 9 Bush (Ky.), 728; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush (Ky.), 522; *Commonwealth v. Boston & Albany R. R. Co.*, 121 Mass. 36. See

*Comm. v. Fitchburg R. R. Co.*, 120 Mass. 372; *S. C.* 126 Mass. 472.

<sup>3</sup> *Louisville, Cincinnati & Lexington R. R. Co. v. Case's admr.*, 9 Bush (Ky.), 728; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush (Ky.), 522.

<sup>4</sup> *Louisville, Cincinnati & Lexington R. R. Co. v. Case's admr.*, *supra*; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush (Ky.), 522.

<sup>5</sup> *Louisville, Cincinnati & Lexington R. R. Co. v. Case's admr.*, *supra*; *Louisville & Portland Canal Co. v. Murphy*, 9 Bush (Ky.), 522.

decendent a right of action for the injury if his death had not ensued.<sup>1</sup> If the next of kin are collateral kindred of the deceased, and have not been receiving from him pecuniary aid, and are not in a condition to require it, no matter then how near the degree of collateral relationship is, only nominal damages can be given, because there is no pecuniary injury or loss.<sup>2</sup> And it is not only necessary to specify in plaintiff's petition who the persons are, and their relationship, for whose interest the administrator prosecutes, but the evidence, to avoid surprise, will be confined on the trial to such relations as are alleged, and is not allowed as to others, even though others there be.<sup>3</sup>

So, likewise, in Illinois and some others of the states, the declaration or petition, as the practice may be, in a civil suit for the death of a person, prosecuted under the statute, must aver, and the proof must show, that there are such widow, husband, children or heirs as are contemplated by the statute, and who are to be the beneficiaries of the recovery, if any be had.<sup>4</sup> The statute of Illinois is a copy of that of New York of 1847, which latter is a copy of the first two sections of the 9th and 10th Victoria, Chapt. 93, enacted in 1846. Under both of these, it is held that the measure of damages is not the loss or suffering of the deceased, but the injury resulting to his family from his death; and that the manner in which the pecuniary loss to

<sup>1</sup> *Chicago & Rock Isld. R. R. Co. v. Morris*, 26 Ill. 400; *Quincy Coal Co. v. Hood*, admr., 77 Ill. 68. As to what will be sufficient evidence of death, the question of identity being raised, see *Kansas Pacific Ry. Co. v. Miller*, 2 Col. 442, 20 Am. Ry. Rep. 245. Declarations of the decedent, contained in letters, are competent to show his marriage, and also documents purporting to be transcripts from official registers, found in the baggage of deceased, but not authenticated: *Ibid.* As to what will be sufficient evidence of the authenticity of such letters: *Ibid.* Where, by statute, transcripts of letters of administration are made evidence, the originals are also evidence: *Ibid.*

<sup>2</sup> *Chi. & Alton R. R. Co. v. Shan-*

*non*, 43 Ill. 346; *Ills. Cent. R. R. Co. v. Weldon*, 52 Ill. 290; *Quincy Coal Co. v. Hood*, admr., 77 Ill. 73; *McIntyre v. N. Y. Cent. R. R. Co.*, 37 N. Y. 287; *Mitchell v. N. Y. Cent. & H. R. R. Co.*, 2 Hun, 535.

<sup>3</sup> *Quincy Coal Co. v. Hood*, admr., 77 Ill. 68, 74, 75; *Vanderslice v. Newton*, 4 N. Y. (Comst.), 130.

<sup>4</sup> *Chicago & Rock Island R. R. Co. v. Morris and others*, admrs., 26 Ill. 400, 403; *Comm. v. Boston & Albany R. R. Co.*, 121 Mass. 36; *State v. Cons. European & N. Am. Ry. Co.*, 67 Me. 482. *Contra*, *Balt. & Ohio R. R. Co. v. Wightman*, 29 Gratt. 431; *S. C. 17 Am. Ry. Rep.* 351; *Matthews v. Warner*, *Id.* 570; *Balt. & Ohio R. R. Co. v. Sherman*, 30 Gratt. 602.

the persons for whose benefit the action is brought, arises, must be alleged and shown—that is, the existence of such relations as are the recipients of the money recovered must be alleged and proven.<sup>1</sup>

In actions for personal injuries causing death, in Louisiana, brought by some one of the next of kin, the plaintiff must show the suit to be in right of the injury to the deceased, and damages resulting to the deceased therefrom.<sup>2</sup> Alleged injuries or damages resulting to the plaintiff are, in such cases, no cause of action.<sup>3</sup> The whole right of action and of recovery by next of kin are in right of the deceased, transmitted to, and devolving on, such next of kin by survivorship, under the civil code. The recovery must be for injuries inflicted on, and damages resulting therefrom to, the deceased; and the character and right in which the next of kin sue, must in that respect appear in their petition.<sup>4</sup>

Under the statute of Indiana, although it is necessary to aver the existence of persons who are by statute entitled to the benefit of the recovery, if one be had, yet it is not required to specifically set out their names.<sup>5</sup> And the remedy given by the statute in such case is not confined to local residents or citizens of the state, but is open equally to residents and citizens of all the states.<sup>6</sup>

In an action against a railroad company for the death of a person, caused, as alleged, by the negligence of the company in the management of its train at a public road crossing, it is not competent for plaintiff to prove to the jury that the railroad company itself had made the road at some long anterior time, and

<sup>1</sup> Chicago & Rock Island R. R. Co. v. Morris and others, admr., 26 Ill. 400, 403.

<sup>2</sup> Earhart v. N. Orleans & Carrollton R. R. Co., 17 La. An. 243.

<sup>3</sup> Earhart v. N. Orleans & Carrollton R. R. Co., 17 La. An. 243.

<sup>4</sup> Earhart v. N. Orleans & Carrollton R. R. Co., 17 La. An. 243. See, also, Proctor v. Hannibal & St. Jos. R. R. Co., 64 Mo. 112; Fowlkes v. Nashville & Decatur R. R. Co., 9 Heisk. 829; Sherman v. Western Stage Co., 24 Ia.

543; Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555.

<sup>5</sup> Jeffersonville, Madison & Indianapolis R. R. Co. v. Hendricks, admr., 41 Ind. 48. See Comm. v. Boston & Worcester R. R. Co., 11 Cush. 512; and, *per contra*, Balt. & Ohio R. R. Co. v. Gettle, 3 W. Va. 376.

<sup>6</sup> Jeffersonville, Madison & Indianapolis R. R. Co. v. Hendricks, admr., 41 Ind. 48; Hartford & New Haven R. R. Co. v. Andrews, 36 Conn. 213.

that its locality at the crossing is, in connection with the formation of the ground there, and the obstructions of standing timber, such as to render the crossing more than ordinarily dangerous. The plaintiff must recover *allegata et probata*, and there being no basis laid in the declaration or petition for such evidence, it, therefore, could not be admitted, even if material or legal; but owing to its remoteness as alleged negligence, it could not be admitted in proof, even if ground was laid therefor in the pleadings. The cause of action must be proximate, and the proof should be of such only.<sup>1</sup>

In fixing damages, well recognized and generally accredited life tables are properly receivable in evidence, in trials for wrongfully causing the death of a person;<sup>2</sup> as, also, evidence of decedent's age, where injured, his usual health, physical ability, profession, and capability of earning and accumulating money and property, the condition and circumstances of his family, and the damage suffered by them in the loss of his care, nurture and instruction.<sup>3</sup>

It is not competent for the defendant to show that the deceased held policies of insurance on his life, for the benefit of his wife and children, and that since his death they have received the insurance.<sup>4</sup> But warnings of an engineer to a conductor (the deceased) in regard to his imprudence in transactions similar to that resulting in his death, are admissible.<sup>5</sup>

**8. Limitation of action for.**—The diversity of legislation of the several states is such that no general rule of limitation can be stated in actions for the negligent or wrongful causing of a person's death. Such diversity exists, not only as to the length

<sup>1</sup>Penn. R. R. Co. v. Weber, 72 Penn. St. 27.

<sup>2</sup>Georgia R. R. & Banking Co. v. Oaks, 52 Geo. 410; Alexander's ex'x v. Bradley, 3 Bush (Ky.), 667; O'Donnell v. O'Donnell's ex'r., 3 Bush (Ky.), 216; Louisville, Cin. & Lex. R. R. Co. v. Mahony's admx., 7 Bush (Ky.), 235.

<sup>3</sup>Baltimore & Ohio R. R. Co. v. Wightman, 29 Gratt. 431, 17 Am. Ry. Rep. 351.

<sup>4</sup>B. & O. R. R. Co. v. Wightman,

*supra*.

<sup>5</sup>Central R. R. & Banking Co. v. Sears, 59 Ga. 436, 18 Am. Ry. Rep. 100. The power of the court granting letters of administration can not be questioned collaterally: Holmes v. Oregon & Cal. Ry. Co., 6 Sawyer, 262; S. C. 5 Fed. Repr. 523, 1 Am. & Eng. R. R. Cas. 623. The subsequent granting of letters by another court of the same state is null and void: *Ibid*.

of time necessary to bar the action, but also as to when that time begins to run. In some of the states, it begins to run from the time of the person's death; in others, from the time of the grant of administration of the estate. Where the action is given to the next of kin, or to some of them, there can be no objection to the time commencing to run from the day of the death; but where the action is to be brought by the personal representative, as executor or administrator, it is the more reasonable to commence only with the grant of letters testamentary, or of administration, on the estate of the deceased.

In Connecticut, the limitation is one year, and is held to commence running only from the time of appointing an executor or administrator of the decedent's estate.<sup>1</sup> In Alabama, the limitation is one year, and the time runs from the day of the death.<sup>2</sup> In Indiana, the limitation is two years, and commences to run at the time of the injured person's death.<sup>3</sup> In Massachusetts (remedy by indictment), the limitation is one year from the date of the injury.<sup>4</sup> In Iowa, the limitation is two years, and the time runs from the date of the injury.<sup>5</sup>

The statute of Ohio (S. & C. 1139, 1140) gave a right of action for an injury causing death, *provided* it should be commenced within two years after the death. This was held to be a condition, and not a mere limitation; and the section containing such proviso having been amended and repealed, after a right of action had accrued, did not affect the condition or extend the limitation.<sup>6</sup>

<sup>1</sup> *Andrews v. The Hartford & New Haven R. R. Co.*, 34 Conn. 57. So in Iowa: *Sherman v. Western Stage Co.*, 24 Ia. 515.

<sup>2</sup> *Selma, Rome & Dalton R. R. Co. v. Lacey*, 49 Geo. 106; Revised Code of Ala., Sec. 227. So in Tennessee: *Fowlkes v. Nashville & Decatur R. R. Co.*, 9 Heisk. 829; S. C. 5 Baxt. 663; and in Vermont: *Needham v. Grand Trunk R. R. Co.*, 38 Vt. 294.

<sup>3</sup> *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's admr.*, 27 Ind.

513; *Hanna v. The Jeffersonville R. R. Co.*, 32 Ind. 113; *Jeffersonville, Mad. & Ind. R. R. Co. v. Hendricks*, 41 Ind. 48.

<sup>4</sup> *Commonwealth v. Boston & Worcester R. R. Co.*, 11 Cush. 512. See *Comm. v. East Boston Ferry Co.*, 13 Allen, 589.

<sup>5</sup> Code of 1873, Sec. 2526, 2529.

<sup>6</sup> *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Hine*, 25 Ohio St. 629, 10 Am. Ry. Rep. 157.

## CHAPTER LV.

### EMPLOYES.

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**1. Duty of company in selecting.**—It is the duty of the company to employ competent, trustworthy and sober persons, and none other, in the various operations of conducting its business.<sup>1</sup> To this end, it is not only bound to observe due care and diligence in their selection, but to discharge from time to time, with promptness, such as, having been selected and employed, shall in any one of these respects prove unfit or faithless, if such unfitness or faithlessness be brought to its knowledge, or there be such circumstances as in law will charge it with

<sup>1</sup> *Sullivan v. The Phila. & Reading R. R. Co.*, 30 Penn. St. (6 Casey), 234; *Pennsylvania R. R. Co. v. Books*, 57 Penn. St. 339, 343; *Beale v. Railway Co.*, 1 Dillon's C. C. R. 568; *Chi. & Great Eastern Ry. Co. v. Harney*, 28 Ind. 28; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; *Gilman v. Eastern R. R. Co.*, 13 Allen, 433; *Ill. Cent. R. R. Co. v. Cox*, 21 Ill. 25; *Marquette & Ontonagon R. R. Co. v. Taft*, 28 Mich. (6 Post), 289; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich. 510; *Quincy*

*Mining Co. v. Kitts*, 42 Mich. 34, 9 Repr. 86; *Flinn v. Phila., Wilm. & Balt. R. R. Co.*, 1 Houston (Del.), 469; *Laning v. The New York Cent. R. R. Co.*, 49 N. Y. (4 Sickels), 521; *Baulec v. New York & Harlem R. R. Co.*, 59 N. Y. 356, 7 Am. Ry. Rep. 114; *Booth v. Boston & Albany R. R. Co.*, 67 N. Y. 593; *S. C. 73 N. Y. 38*; *Besel v. N. Y. Cent. & Hudson River R. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kans. 83; *S. C. 14 Kans. 512*;



knowledge; and if it does not, the law charges it with negligence.<sup>1</sup> A disregard or neglect of any of these duties on the part of the company renders it liable for injuries resulting from accidents occasioned by, or growing out of, the unfitness, incompetency, faithlessness or incapacity of its employees.<sup>2</sup>

And even if due care and diligence be used in their selection in the first place, so as to exempt the company so far as regards the manner of their selection, yet if proving thereafter to be exceptionable, and the company, having knowledge thereof, retain them, it will in like manner be liable for injuries so, resulting as aforesaid from their deficiency or unfitness in their respective places;<sup>3</sup> subject, however, to all qualifying circumstances, if any, in regard to contributory negligence of the injured party, and in regard to a continuance in the service with knowledge of these exceptionable qualities of the co-servant,

*Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245; *Tyson v. S. & N. Ala. R. Co.*, 61 Ala. 554; *Bassett v. Norwich & W. R. R. Co.*, 19 Law Repr. 551 (Superior Ct. Conn.); *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60; *Jordan v. Wells, 3 Woods*, 527; *Potts v. Port Carlisle D. & Ry. Co.*, 2 Law Repr. (N. S.), 283. It is gross negligence in a railroad company to receive an infant into their employ, unless he understand fully the hazard and danger of the business, and be instructed how to avoid it: *St. Louis & South Eastern Ry. Co. v. Valirius*, 56 Ind. 511, 18 Am. Ry. Rep. 116.

<sup>1</sup> *Sullivan v. The Phila. & Reading R. R. Co.*, 30 Penn. St. (6 Casey), 234; *Chi. & Great Eastern Ry. Co. v. Harney*, 28 Ind. 28; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233; *Gilman v. Eastern R. R. Co.*, 13 Allen, 433; *Laning v. New York Cent. R. R. Co.*, 49 N. Y. 521; *Baulec v. N. Y. & Harlem R. R. Co.*, *supra*; *Marquette & Ontonagon R. R. Co. v. Taft*, 28 Mich. (6 Post), 289.

<sup>2</sup> *Beale v. Railway Co.*, 1 Dillon's C. C. R. 568; *Sullivan v. The Phila. & Reading R. R. Co.*, 30 Penn. St. (6 Car-

sey), 234; *Penn. R. R. Co. v. Books*, 57 Penn. St. 339, 343; *Huntingdon & Broadtop Mt. R. R. & Coal Co. v. Decker*, 82 Penn. St. 119, 15 Am. Ry. Rep. 425; *Baulec v. N. Y. & Harlem R. R. Co.*, *supra*; *Hardy v. Carolina Central Ry. Co.*, 76 N. Car. 5, 14 Am. Ry. Rep. 309.

<sup>3</sup> *Baulec v. N. Y. & Harlem R. R. Co.*, *supra*. But a single instance of negligence on the part of an employe will not prove him unworthy: *Ibid*; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich. 510. And a master may presume that an employe whose character was good when employed, continues to be good: *Chapman v. Erie Ry. Co.*, 55 N. Y. 579, 7 Am. Ry. Rep. 357; *Crandall v. McIlrath*, 24 Minn. 127. But if he be notified to the contrary, it is his duty to inquire into it: *Chapman v. Erie Ry. Co.* Without such notice, he will not be liable for injuries received by a co-servant: *Ibid*. But see, *contra*, *Chicago, Rock Island & Pacific R. R. Co. v. Doyle*, 18 Kans. 58, 15 Am. Ry. Rep. 187, where it is said that if the employe is grossly and notoriously unfit, notice will be presumed. And evidence is proper that

whose negligence causes the injury,<sup>1</sup> or of a failure, if informed thereof, to report the same to the company.<sup>2</sup> But if the co-servant or co-employee by reason of whose negligence, incapacity or unfitness for the service the accident has occurred, shall have been employed by the company with a knowledge of his unfitness, or carelessly employed, without proper care on the part of the company to ascertain and inform itself in regard thereto, then the company will be liable.<sup>3</sup> And of the evidence in that respect to establish the facts of the case, the one way or the other, the jury are the judges;<sup>4</sup> and the burden of proof is upon the plaintiff.<sup>5</sup>

There is an implied warranty or undertaking of railroad cor-

a division superintendent, who had power to discharge employes, had heard that the servant had "been off on a spree—drinking," and had reprimanded him: *Chapman v. Erie Ry. Co.*, *supra*. And see *Huntingdon & B. Mt. R. R. & Coal Co. v. Decker*, *supra*; *Couch v. Watson Coal Co.*, 46 Ia. 17; *Lee v. Detroit Bridge & Iron Works*, 62 Mo. 565. Proof of a subsequent discharge is not admissible: *Couch v. W. Coal Co.*, *supra*.

<sup>1</sup> *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 541; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; S. C. 5 Hun, 31; *Mehan v. Syracuse, B. & N. Y. R. R. Co.*, 73 N. Y. 585; *DeForest v. Jewett*, 19 Hun, 509; *DeGraff v. N. Y. Cent. & H. R. R. Co.*, 3 *Thomp. & C.* 255; *Harper v. Indianapolis & St. Louis R. R. Co.*, 44 Mo. 488; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *Kelley v. Silver Spring B. & D. Co.*, 12 R. I. 112; *Mansfield Coal & C. Co. v. McEnery*, 91 Penn. St. 185; S. C. 37 Leg. Int. 28; *Chi. & Alton R. R. Co. v. Rush*, 84 Ill. 570; *Same v. Munroe*, 85 Ill. 25; *Penn. Co. v. Lynch*, 90 Ill. 333.

<sup>2</sup> *Chicago & Alton R. R. Co. v. Rush*, 84 Ill. 570; *Frazier v. Penn. R. Co.*, 38 Penn. St. 104; *Davis v. Detroit & M. R. R. Co.*, 20 Mich. 105.

<sup>3</sup> *McDermott v. Pacific R. R. Co.*, 30 Mo. 115; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187; *Gibson v. Pacific R. R. Co.*, 46 Mo. 163; *Harper*, by his next friend, *v. Indianapolis & St. Louis R. R. Co.*, 47 Mo. 567; *Wright v. N. York Cent. R. R. Co.*, 25 N. Y. 565; *Baulec v. N. Y. & Harlem R. R. Co.*, *supra*; *Snow v. Housatonic R. R. Co.*, 8 Allen, 444, 445; *Gilman v. Eastern R. R. Co.*, 10 Allen, 233.

<sup>4</sup> But the question of negligence by the servant will not be submitted to the jury where the evidence is equally divided, or fails to sustain the charge: *Baulec v. N. Y. & Harlem R. R. Co.*, *supra*. In such case the appellate court will not disturb the verdict solely on the question of preponderance of evidence: *Union Pacific Ry. Co. v. Young*, 19 Kans. 488, 19 Am. Ry. Rep. 52.

<sup>5</sup> *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; S. C. 28 Barb. 80; *Davis v. Detroit & Milw. R. R. Co.*, 20 Mich. 105; *Columbus, Chicago & Ind. Cent. Ry. Co. v. Troesch*, 57 Ill. 155; S. C. 68 Ill. 545; *Murphy v. St. Louis & Iron Mountain R. R. Co.*, 71 Mo. 202; S. C. 10 Cent. L. J. 377; *Allen v. New Gas Co.*, Law Rep. 1 Exch. Div. 251.

porations, in favor of those doing business on, or passing over, their lines, that their employes and servants in charge of and concerned in running of trains, are competent and suitable persons for their respective stations;<sup>1</sup> and in some of the states this extends as well to acts of maliciousness, as to negligence, done or omitted in the course of, or while exercising the powers and performing the duties confided to them, if the act be done or omitted in the use of means or power conferred by the company.<sup>2</sup> And proof of a collision is *prima facie* evidence of negligence.<sup>3</sup>

An action in tort, for damages occasioned by the conductor or other servant of a railroad company, committed in the course of his business employment, may join as defendants both the company and the servant committing the wrong act.<sup>4</sup> In such action, one defendant may be convicted, and the other discharged; and such a finding will be no objection to the verdict.<sup>5</sup>

Upon principles analogous to those before stated, the company is bound to provide a sufficient number of employes to properly manage its trains and transact its business.<sup>6</sup>

A strike of railroad employes, however unjustly or without cause in the management of the company, is no excuse to the

<sup>1</sup> New Orleans, Jackson & Great Northern R. R. Co. v. Allbritton, 38 Miss. 242. But not so in the case of persons employed to construct the road, if due care is used in their selection: Mansfield Coal & C. Co. v. McEnery, 91 Penn. St. 185; S. C. 37 Leg. Int. 28.

<sup>2</sup> New Orleans, Jackson & Great Northern R. R. Co. v. Allbritton, 38 Miss. 242; Toledo, Wabash & Western Ry. Co. v. Harmon, 47 Ill. 298; Chicago, Burlington & Quincy R. R. Co. v. Dickson, 63 Ill. 151, 7 Am. Ry. Rep. 45.

<sup>3</sup> New Orleans, Jackson & Great Northern R. R. Co. v. Allbritton, 38 Miss. 242. But see, *contra*, Ill. Cent. R. R. Co. v. Houck, 72 Ill. 285; Toledo, Wabash & Western Ry. Co. v. Moore, 77 Ill. 217; Mobile & Ohio R. R. Co. v. Thomas, 42 Ala. 672; Kan-

sas Pac. Ry. Co. v. Salmon, 11 Kans. 83.

<sup>4</sup> Moore v. Fitchburg R. R. Co. and another, 4 Gray, 465; Hewett v. Swift, 3 Allen, 420; Holmes v. Wakefield, 12 Allen, 580; Brokaw v. N. J. R. R. & T. Co., 3 Vroom, 328. And when so joined, evidence of the pecuniary ability of the company, in aggravation of damages, is improper: Chicago City Ry. Co. v. Henry, 62 Ill. 142, 6 Am. Ry. Rep. 365.

<sup>5</sup> Moore v. Fitchburg R. R. Co. and another, 4 Gray, 465, 467.

<sup>6</sup> Stoddard v. St. Louis, Kansas City & Northern Ry. Co., 65 Mo. 514; Booth v. Boston & Albany R. R. Co., 67 N. Y. 593; S. C. 73 N. Y. 38; Harvey v. N. Y. Cent. & H. R. R. Co., 19 Hun, 556; Mad River & L. E. R. R. Co. v. Barber, *supra*.

company for not transporting freight in a reasonable time, whereby the property received for carriage is lost. The company can not defend itself from loss upon the ground of its own servants' wrong acts.<sup>1</sup>

The negligence of the company in not providing proper servants, must be alleged in the declaration.<sup>2</sup>

**2. Right of company to discharge.**—The rule of the English law of master and servant, that entitles the latter to a month's notice, or else to a month's additional pay, if turned off without proper cause, is based upon usage, and has never obtained a place in the jurisprudence of these states. But it is holden here, that when the hiring is for a given time, and for a stipulated price, as, for instance, a hiring from month to month, or from year to year, or simply for a month or a year, or other specified period, that if the employer discharge the servant or employe before the time specified, he will be liable to pay the servant's wages for the full term of his engagement, in case he remain unemployed during such term; the recovery to be had at the end of the term.<sup>3</sup> If, however, the employe obtain other employment after his discharge, and during any part of the unexpired term, then the compensation received or realized therefrom is to be deducted from the amount which would otherwise be due to him from the person by whom he was thus improperly discharged.<sup>4</sup> And this principle in relation to the discharge of an employe or servant in the midst of his term, and without reasonable cause, as also the rule of modified liability in case of his subsequent employment, above given, are holden to apply to railroad companies and their employes.<sup>5</sup>

So it may be shown, in diminution of the amount to be recovered, that the employe thus discharged had opportunity for employment in the same locality or vicinity, and in like kind of

<sup>1</sup> *Blackstock v. New York & Erie R. Co.*, 20 N. Y. (6 Smith), 48; *Weed v. Panama R. R. Co.*, 17 N. Y. 362.

<sup>2</sup> *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60.

<sup>3</sup> *Hoyt v. Wildfire*, 3 John. 518; *Ward v. Ames*, 9 John. 138; *Costigan v. The Mohawk & Hudson R. R. Co.*, 2 Denio, 609; *Emerson v. Howland*, 1

*Mason*, 51; *Stewart v. Walker*, 14 Penn. St. R. 293.

<sup>4</sup> *Stewart v. Walker*, 14 Penn. St. R. 293; *Shannon v. Comstock*, 21 Wend. 457; *Costigan v. The Mohawk & Hudson R. R. Co.*, 2 Denio, 609.

<sup>5</sup> *Costigan v. The Mohawk & Hudson R. R. Co.*, 2 Denio, 609.

business, during a portion or all of the unexpired term from which he was discharged.<sup>1</sup>

Some of the cases rest the liability of the employer for such wrongful discharge, upon the principle of damages for breach of contract, and regard the amount agreed upon as wages as the measure of damages, or in the nature of stipulated damages: subject, however, as before stated, to deduction therefrom of any sum realized by subsequent employment, or opportunity for proper employment, in the residue of the term.<sup>2</sup>

The case of *Costigan v. The Mohawk and Hudson Railroad Company* was an action brought by Costigan for his salary as superintendent of said railroad. He was employed to superintend the same for a term of one year from the first of May, at a fixed salary, and was discharged by the company, without cause, on the first day of the following July. Thereupon he gave notice to the company of his readiness to perform his contract, and that he should claim his salary for the entire year. The same not being paid, he brought suit, and the court held that he was entitled to recover as for the whole year, in the absence of evidence of his having any subsequent employment during any portion of that time, or of opportunity thereof.

**3. Liability for their conduct at common law.**—Where different persons are employed by the same principal in a common enterprise or business, whether in the same branch of the business or not, no action at common law can be sustained by them, or either of them, against their common employer, on account of injuries sustained by one or more of them through the negligence of another one or more of them. An employe can not, at common law, maintain an action against the employer for injuries received by reason of the negligence of his co-employe or fellow servant;<sup>3</sup> unless such servant be an improper or incom-

<sup>1</sup> *Costigan v. Mohawk & Hudson R. R. Co.*, 2 Denio, 609; *Shannon v. Comstock*, 21 Wend. 457; *Hoyt v. Wildfire*, 3 John. 518.

<sup>2</sup> *Costigan v. M. & H. R. R. Co.*, *supra*.

<sup>3</sup> *Fort v. Union Pacific R. R. Co.*, 2 Dillon C. C. R. 259; *Hunt v. The Chi. & N. W. R. R. Co.*, 26 Iowa, 363; *O'Connell v. The Baltimore & Ohio R.*

*R. Co.*, 20 Md. 212; *Ryan v. The Cumberland Valley R. R. Co.*, 23 Penn. St. (11 Harris), 384; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Penn. St. 239; *Dow v. Kansas Pacific Ry. Co.*, 8 Kansas, 642; *Union Pacific Ry. Co. v. Milliken*, 8 Kansas, 647; *Madison & Indianapolis R. R. Co. v. Bacon*, 6 Ind. (Porter), 205; *Ohio & Miss. R. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v.*

petent one, and not then, unless there has been negligence in the selection or retention of the servant or servants whose negligence occasions the injury.<sup>1</sup>

And an ordinary servant of the company can not commit the company to liability for his acts or conduct which are outside the scope of his authority; as, for instance, where a brakeman or engineer, in charge of an engine and tender about to take in water, requests the assistance of an entire stranger to "put in the hose and turn on the water," and he is killed whilst in the act of doing so, the company are not liable.<sup>2</sup> The court below

Madison, etc., R. R. Co., 18 Ind. 226; Thayer v. St. Louis, Alton & Terre Haute R. R. Co., 22 Ind. 26; Slattery's admr. and others v. Toledo & Wabash Ry. Co., 23 Ind. 81; Ohio & Miss. R. R. Co. v. Hammersley, 28 Ind. 371; Honner v. Ill. Cent. R. R. Co., 15 Ill. 550; Ill. Cent. R. R. Co. v. Cox, 21 Ill. 20; Chi. & Alton R. R. Co. v. Keefe, 47 Ill. 108; Chicago & N.W. R. R. Co. v. Ward, 61 Ill. 130; Whaalan v. The Mad River & Lake Erie R. R. Co., 8 Ohio St. 249; Manville v. The Cleveland & Toledo R. R. Co., 11 Ohio St. 417; Sherman, admr., v. The Rochester & Syracuse R. R. Co., 17 N. Y. (3 Smith), 153; Boldt v. New York Cent. R. R. Co., 18 N. Y. 432; Wright v. Same, 25 N. Y. 562; Harrison v. Central R. R. Co., 2 Vroom (N. J.), 293; Murray v. The South Car. R. R. Co., 1 McMullan, 385; Marquette & Ontonagon R. R. Co. v. Taft, 28 Mich. (6 Post), 289; Summerhays v. Kansas Pacific Ry. Co., 2 Col. 484, 20 Am. Ry. Rep. 359. And the circumstance that the servant performed other duties than those in discharge of which he receives his injury, will neither diminish nor increase his right of action: Wilson v. Mad., etc., R. R. Co., *supra*. This doctrine of the common law was first explicitly asserted, we believe, in the case of Priestley v. Fowler, in 1837, and is, perhaps, the first

case in the English books thus limiting the liability of the superior: 3 M. & W. 1; Hutchinson v. The York, N. & B. Railway Co., 5 Exch. R. 343; Wigmore v. Jay, *Id.* 354. It is now the settled law of the English and American courts, unless where otherwise declared by statute; exceptions thereto, as in Ohio, resting principally upon the distinction as to who are in some cases co-servants, and who are not, so as to involve liability on one party from the character of principal. See Cleveland, Columbus & Cin. R. R. Co. v. Keary, 3 Ohio St. 201.

<sup>1</sup> Wonder v. Baltimore & Ohio R. R. Co., 32 Md. 411; S. C. 3 Am. Reps. 143, 145; Dow v. Kansas Pacific Ry. Co., 8 Kansas, 642; Union Pacific Ry. Co. v. Milliken, 8 Kansas, 647; Thayer v. St. Louis, Alton & Terre Haute R. R. Co., 22 Ind. 26; Harrison v. Cent. R. R. Co., 2 Vroom (N. J.), 293; Hubgh v. New Orleans & Carrollton R. R. Co., 6 La. An. 495; Summerhays v. K. P. Ry. Co., *supra*.

<sup>2</sup> Flower v. The Penn. R. R. Co., 69 Penn. St. 210; Ohio & Miss. R. R. Co. v. Hammersley, 28 Ind. 371. And by the last case cited, the rule is the same if the injured employe be a minor, employed by consent of the father: *Id.* And see DeGraff v. N. Y. Cent. & H. R. R. R. Co., 76 N. Y. 125; S. C. 3 Thomp. & C. 255; Sullivan v. To-

ruled that the act of the servant inviting the boy to aid in filling the tank, was an act done outside of the scope of his authority—in other words, that his vocation and business or office of fireman, or of engineer, did not confer on him authority to engage or solicit the assistance of outsiders in the discharge of his duties, and that his doing so placed no liability or obligation on the company. This ruling of the court below, where judgment went for defendant, was the principal point relied on for error in the court above. In the Supreme Court, the ruling below was sustained.<sup>1</sup> The novelty and yet importance of this case is so great, and the opinion of the court (AGNEW, J.) so searching and able, that we venture to give the material portion of it, at the risk of being tedious.<sup>2</sup>

ledo, Wabash & Western Ry. Co., 58 Ind. 26; Houston & Great Northern R. R. Co. v. Miller, 51 Tex. 270.

<sup>1</sup> But if the outside party perform his voluntary duty in safety, and cease to occupy his position as volunteer assistant, and then be injured through the negligence of the company's employe, and without fault on his part, the company, as in other cases, will be liable: Cumberland Valley R. R. Co. v. Myers, 55 Penn. St. 288.

<sup>2</sup> "At the water-station the fireman in charge asked the son of the plaintiffs, a boy ten and a half years old, standing on the platform of the water-tank, to put in the hose and turn on the water; and then turned to clean out the ashpan of the engine. The boy climbed up the side of the tender to put in the hose, and as he did, some detached freight-cars, belonging to the train, came down without a brakeman, and struck the car behind the tender, driving the tender and engine forward from six to ten feet. The boy fell from the tender and was crushed to death. Is the railroad company responsible to the parents? The case involves no public right. The accident happened at no crossing, or place where the public had a right to be. The boy was

not a passenger, or one to whom the company owed a special duty. The platform of the water-tank was the private property of the company, and was used for its own purposes. The engine and tender were where they had a right to be. The track itself was the property of the company, and the detached cars were not the cause of injury in any sense which affected the public rights, or even those of the employes of the company. They came against the car and tender with no great force, and did no injury to the property or employes of the company. They were the cause of the injury to the boy, only in so much that he had placed himself in a position of danger, where ordinarily he had no right to be. It is evident, therefore, that the case turns wholly on the effect of the request of the fireman, who was temporary engineer, to put in the hose, and turn on the water. Did that request involve the company in the consequences? This is a very hard case. A willing, bright boy, not arrived at years of discretion, has lost his life in simply trying to oblige the fireman. But we must not suffer our sympathies to do injustice to others, by overriding those fixed principles which underlie

The force of this principle of non-liability of the employer for injuries inflicted in the course of their common employment on one employe of a railroad company by reason of the negligence

the rights of all men, and are essential to justice. It is natural justice that one man should not be held liable for the act of another, without his participation, his privity or his authority. It is clear that the fireman, through his indolence, or haste, was the cause of the boy's loss of life. Unless his act can be legally attributable to the company, it is equally clear the company was not the cause of the injury. The maxim, *Qui facit per alium facit per se*, can apply only where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine-tank with water. This seems to be equally plain without resorting to the evidence given, that engineers are not permitted to receive any one on the engine but the conductor, and the foreman or superintendent, that it is the duty of the fireman to supply the engine with water, that he has no power to invite others to do it, and can leave his post only on a necessity. The business of an engineer requires skill and constant attention and watchfulness; and that of a fireman requires some skill and much attention. They are in charge of a machine of vast power, and large capacity for mischief. The responsibility resting on them, and especially on the engineer, is great, and neither should be permitted to delegate the performance of his duties to others. In doing so without permission they transcend their powers. There can not, therefore, be any general authority in the engineer and fireman which can embrace a request to perform the fireman's duties. Even

an adult, to whom no injury would be likely to ensue, could not justify under the fireman's request. Much less can there be any presumption of authority to invite a boy of tender years to perform a service, which required him to clamber up the side of the engine or tender. It was a wrong on the part of the fireman to ask such a youth to do it. Whether the boy could be treated as a mere trespasser is scarcely the question. His youth might possibly excuse concurrent negligence where there is clear negligence on part of company. Such were the cases of *Lynch v. Nurdin*, 1 A. & E. N. S. 29 (41 E. C. L. 422); *Rauch v. Lloyd & Hill*, 7 Casey, 358; *Smith v. O'Connor*, 12 Wright, 218. See, also, *Phil. & R. Railroad Co. v. Spearen*, 11 Wright, 300, and *Oakland Railway Co. v. Fielding*, 12 *Id.* 320. The true point of this case is, that in climbing the side of the tender or engine at the request of the fireman, to perform the fireman's duty, the son of the plaintiffs did not come within the protection of the company. To recover, the company must have come under a duty to him, which made his protection necessary. Viewing him as an employe at the request of the fireman, the relation itself would destroy his right of action: *Caldwell v. Brown*, 3 P. F. Smith, 453; *Weger v. Penna. Railroad Co.*, 5 *Id.* 460; *C. V. Railroad Co. v. Myers*, 5 *Id.* 288. Had the fireman himself fallen in place of the boy, he could have had no remedy. It does not seem reasonable that his request to the boy to take his place, without any authority, general or special, can elevate the boy to a higher position than his own, and create a liability where none would attach had



of another, was considered and recognized as law in the New York Court of Appeals for the first time in 1851.<sup>1</sup> In the case here cited from 5th New York, Justices GARDINER and FOOT examine the question extensively, and recognize the principle as correct, and as asserted in England,<sup>2</sup> Massachusetts and South Carolina;<sup>3</sup> and declare that it must now be considered as settled, and as the common law in this country.<sup>4</sup>

The doctrine, however, that the employer is not liable to one employe for injuries sustained by reason of the negligence of another employe of the same employer, engaged in the same common business, is applicable only to cases where the injury

he performed the service himself. It is not like the case of one injured while on board a train by the sufferance of the conductor, whose general authority extends to receiving and discharging persons to and from the train: *Penna. Railroad Co. v. Books*, 7 P. F. Smith, 339. It is not like those cases where an injury happened to boys crawling under the cars to get through a train occupying a public street, which they had a right to cross: *Rauch v. Lloyd & Hill*, *Penna. Railroad Co. v. Kelly*, 7 Casey, 358 & 372. Nor does it resemble the case of *Lizzie Kay v. Penna. Railroad Co.*, 15 P. F. Smith, 269, decided at Philadelphia last year, where detached cars were sent around a curve, without a brakeman in charge, upon a track which the public had been in the habit of traveling over constantly for a long time with the knowledge of the company, from one part of the city of Williamsport to another. Here the boy was voluntarily where he had no right to be, and where he had no right to claim protection; where the company was in the use of its private grounds, and was not abusing its privileges, or trespassing on the rights or immunities of the public. The only apology for his presence there, is the unauthorized request of one who could not delegate his duty, and had no ex-

cuse for visiting his principal with his own thoughtless and foolish act. Nor can the mere youth of the boy change the relations of the case. That might excuse him from concurring negligence, but can not supply the place of negligence on the part of the company, or confer an authority on one who has none. It may excite our sympathy, but can not create rights or duties which have no other foundation. Upon the whole case, finding no error in the record, judgment is affirmed." 69 Penn. St. 214-216.

<sup>1</sup>*Coon v. The Syracuse & Utica R. R. Co.*, 5 N. Y. (1 Selden), 492.

<sup>2</sup>*Priestley v. Fowler*, 3 Mees. & Welsb. 1; *Hutchinson v. The York, N. & B. Ry. Co.*, 5 Exch. 343; *Wigmore v. Jay*, 5 Exch. 354; *Skipp v. Eastern Counties Ry. Co.*, 9 Exch. 223; *Waller v. South Eastern Ry. Co.*, 2 Hurl. & C. 102; *Lovegrove v. London, Brighton & S. Coast Ry. Co.*, 16 Com. B. (N. S.), 669; *Lovell v. Howell*, L. R. 1 C. P. Div. 161; *Rourke v. White Moss Colliery Co.*, L. R. 1 C. P. Div. 556.

<sup>3</sup>Citing *Farwell v. B. & W. R. R. Co.*, 4 Met. 49; *Murray v. S. Carolina R. R. Co.*, 1 McMullan, 385; *Hayes v. Western R. R. Co.*, 3 Cush. 272.

<sup>4</sup>*Coon v. The Syracuse & Utica R. R. Co.*, 5 N. Y. 492, 496.

complained of occurs without the fault or misconduct of the principal himself, in reference to the act which causes the injury, or in the selection and employment of the agent or employe by whose immediate fault the injury occurs.<sup>1</sup>

The common law rule that the company is not liable for an injury resulting to one servant from the negligence of a fellow servant, is followed also in Wisconsin;<sup>2</sup> but with an exceptionable case of ruling to the contrary by PAINE, J., in one case,<sup>3</sup> and by a dissenting opinion from the same judge (PAINE) in the case of *Cooper, admr., etc., v. The Milwaukee & Prairie du Chien Railway Company*, above cited.

But though there is no liability on the company for the injury, at common law, of one of its servants by the negligence of another one of its co-equal servants with the injured one,<sup>4</sup> yet the authorities all agree that for an injury to a servant or employe, resulting from the negligence or wrong of the employer himself, there is liability, and, therefore, that a railroad company is liable for injury inflicted on its employe by reason of a wrong act, negligence or omission of duty by the company itself. Hence frequent difficulties arise as to whether an injury complained of emanates from the act of a co-servant, or from the conduct of the principal. In Ohio, the rule declared is, that when an employer places one person in his employ under the direction of another, also in his employ, such employer is liable for an injury to the person placed in the subordinate situation, occasioned by the negligence of such superior.<sup>5</sup> In such case, the ruling in Ohio regards the person thus placed in control as the substitute

<sup>1</sup> *Keegan v. The Western R. R. Co.*, 8 N. Y. (4 Selden), 175; *Laning v. The New York Cent. R. R. Co.*, 49 N. Y. (4 Sickels), 521; *Brothers v. Cartter*, 52 Mo. 372; *Tarrant v. Webb*, 18 Com. B. 797; *Paterson v. Wallace*, 1 Macq. 748; *Brydon v. Stewart*, 2 Macq. 30; *Wilson v. Merry*, L. R. 1 H. L. (Scotch), 326.

<sup>2</sup> *Chamberlain v. The Mil. & Miss. R. R. Co.*, 7 Wis. 425; *Moseley v. Chamberlain*, 18 Wis. 700; *Cooper, admr., v. The Mil. & Prairie du Chien Ry. Co.*, 23 Wis. 668.

<sup>3</sup> *Chamberlain v. The Mil. & Miss.*

*R. R. Co.*, 11 Wis. 238.

<sup>4</sup> *Pittsburg, Fort Wayne & Chicago R. W. Co. v. Devinney*, 17 Ohio St. 198.

<sup>5</sup> *The Little Miami R. R. Co. v. Stevens*, 20 Ohio, 415; *Cleveland, Columbus & Cincinnati R. R. Co. v. Keary*, 3 Ohio St. 201; *Whaalan v. Mad River & Lake Erie R. R. Co.*, 8 Ohio St. 249; *P., Ft. W. & C. Ry. Co. v. Devinney*, *supra*; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Pittsburgh, Ft. Wayne & Chi. Ry. Co. v. Lewis*, 33 *Id.* 196; *Mann v. Oriental Print Works*, 11 R. I. 152.

of the principal or employer, and holds the latter responsible for his negligence, as if his own.<sup>1</sup> As a result of this ruling, it is there held that an injury to the engineer of a train, or to a brakeman of a train, occasioned by the negligence or omission, or wrong order, of the conductor in charge of the train, and whose orders the engineer or brakeman is bound to obey, is an injury caused by the principal, the railroad company, and that the latter is liable, if there be no contributory negligence on the part of the injured person.<sup>2</sup> But otherwise, where the employes are of the same grade as co-servants.<sup>3</sup>

**4. Liability for their conduct, by statute.**—In some of the states the common law rule that exempts the company from accountability for injuries received by an employe from the negligence or misconduct of his co-employe, is abolished by statute, and the company are held to a similar liability, in its main features, as it would be subject to if the injury had occurred by reason of the negligence of the company itself.<sup>4</sup>

In Iowa it is enacted that "Every railroad company shall be liable for all damages sustained by any person, including employes of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineers or other employes of the corporation, to any person sustaining such damage."<sup>5</sup> The Supreme Court of that state hold that this statute simply creates and declares a legal liability and a right, and does not in any manner change the legal rule of ascertaining and enforcing the right thus declared, or dispense with the necessity of ordinary care, as required by the common law, on the part of the injured party;<sup>6</sup> nor does it hold the company to any extraordinary care or diligence on the part of its employes toward each other.<sup>7</sup>

<sup>1</sup> Cleveland, Columbus & Cincinnati R. R. Co. v. Keary, 3 Ohio St. 201, 206, 207; Little Miami R. R. Co. v. Stevens, 20 Ohio, 415. And see Nashville & Chattanooga R. R. Co., and M. & C. R. R. Co., v. Carroll, 6 Heisk. 347, 12 Am. Ry. Rep. 20.

<sup>2</sup> Cleveland, Columbus & Cincinnati R. R. Co. v. Keary, *supra*; The Little Miami R. R. Co. v. Stevens, 20 Ohio, 415.

<sup>3</sup> Manville v. The Cleveland & Toledo R. R. Co., 11 Ohio St. 417; Colum-

bus & Xenia R. R. Co. v. Webb, 12 Id. 475; P., F. W. & C. Ry. Co. v. Devinney, *supra*.

<sup>4</sup> Iowa Code of 1873, Sec. 1307; Hunt v. Chi. & N. W. R. R. Co., 26 Iowa, 363.

<sup>5</sup> Laws of 1862, Chapt. 169, Sec. 7; Code of 1873, Sec. 1307; Hunt v. Chi. & N. W. R. R. Co., 26 Iowa, 363, 364.

<sup>6</sup> Hunt v. Chi. & N. W. R. R. Co., 26 Iowa, 363.

<sup>7</sup> Hunt v. Chi. & N. W. R. R. Co., 26 Iowa, 363.

By a subsequent enactment, this statutory liability for acts of employes is so enlarged, in Iowa, as to extend to cases of "willful wrongs, whether of commission or omission, of their agents and employes, when such willful wrongs are in any manner connected with the use and operation of any railroad so owned or operated, on or about which they shall be employed"; and it further provides that no contract which restricts such liability shall be legal or binding.<sup>1</sup> The Supreme Court of that state hold that, under this statute, a railroad company is liable for the death of an employe whose employment was as a laborer on a construction train, and whose death was caused by the falling in of a bank whereat he was engaged in excavating and loading a train.<sup>2</sup> The court, COLE, Justice, say, in substance, that if his employment had been exclusively "for shoveling or loading the dirt, he could not recover, although he might have rode to and from his work on the cars. The ground we rest our affirmance upon is, that where the employment is entire, and a part of the continuous services relates to the perilous business of railroading, it brings the case within the statute and its constitutional limit."

To render the owner or company liable for the result of another's negligence, the relation of master and servant must exist between such owner or employer and the person whose negligence or wrong act causes the injury. If such person be merely a contractor to perform a job, doing it in his own way, and furnishing all appliances and materials, and acting under the direction of the owner, and the business itself or thing to be done is not of itself of a dangerous character, then the doctrine of *respondeat superior* does not apply, for there is no superior, forasmuch as the contractor is his own master and own director, and is alone liable for his own negligence or wrong act.<sup>3</sup>

**5. Not liable for their crimes or willful wrongs, etc.**—That a master or employer is only liable, ordinarily, for the negligence

<sup>1</sup> Code of 1873, Sec. 1307; Laws of 13 Genl. Ass., Chapt. 121, and 14 Genl. Ass., Chapt. 65.

<sup>2</sup> *Deppe v. Chi., Rock Isld. & Pacific R. R. Co.*, 36 Iowa, 52, 56.

<sup>3</sup> *Wood v. Independent School Dist.*, 44 Iowa, 27; *Chicago v. Robbins*, 2 Black, 418; *West v. The St. Louis,*

*Vandalia & Terre Haute R. R. Co.*, 63 Ill. 545; *S. C. 7 Am. Ry. Reps.* 50; *Peck v. The Mayor, et al.*, of New York, 8 N. Y. 222; *King v. New York Cent. & H. R. R. Co.*, 66 N. Y. 181; *Reedie v. The London & N. W. R. W. Co.*, 4 Exch. 244.

or the careless mistake of his employe or servant, and not for his intentional wrongs or willful trespasses, although he commit such acts in the course of his employment, or while he is employed in his master's business, has been long and almost uniformly recognized as an established principle of the law; and from which it follows that a railroad corporation, or other corporation, can not be held accountable for wrong acts or trespasses intentionally or willfully committed by one of its employes, outside of his authority, whatever his grade of employment may be, although done whilst in the exercise of the business of his employment.<sup>1</sup> The Supreme Court of Iowa, WRIGHT, J., in the case cited from 12 of Iowa, say: "The distinction between the act of the agent which is merely tortious, the result of carelessness or negligence, and one willful, intentional, done from design or set purpose, as affecting the rights of the principal, is too patent, too obvious, to need elucidation."<sup>2</sup>

The same court, DAY, J., in *Cooke v. The Illinois Central Railroad Company*, say: "That a master is not liable for the willful acts of his servant, has been long and almost uniformly recognized as a rule of law. The very question involved in this case was presented to this court in *De Camp v. The Mississippi and Missouri Railroad Company*, 12 Iowa, 348, and it was there held, that a railroad company is not liable for the willful acts of its engineer, in running a locomotive and train belonging to the company."<sup>3</sup>

But although the master is not ordinarily responsible for the willfully wrong act of his servant, wantonly committed outside of the course of his employment or duties, yet a railroad company is responsible for the wrong act of a conductor in wantonly and wrongfully excluding a passenger from one of its trains, who has a right to be and remain thereon, notwithstanding his action in that respect be induced by improper motive of the

<sup>1</sup> *De Camp v. The Miss. & Mo. R. R. Co.*, 12 Iowa, 348; *Cooke v. The Ill. Cent. R. R. Co.*, 30 Iowa, 202; *Phila., G. & N. R. R. Co. v. Wilt*, 4 Whart. 143; *Pitta., Allegh. & Manchester Passenger Railway Co. v. Donahue*, 70 Penn. St. 119; *Wright v. Wilcox*, 19 Wend. 343; *Hill on Torts*, Vol. 2, 524; *Locke v. Stearns*, 1 Met.

560; *Leggett v. Simmons*, 7 Smedes & M. 348; *McKeon v. Citizens R. W. Co.*, 42 Mo. 79; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110.

<sup>2</sup> *De Camp v. Mississippi & Missouri R. R. Co.*, 12 Iowa, 348, 350.

<sup>3</sup> *Cooke v. Ill. Cent. R. R. Co.*, 30 Iowa, 202, 203.

conductor; for it occurs in the course of his employment, and in the exercise of a privilege or power, and is a wrong manner of discharging a duty pertaining to his office, and therefore the company is liable for the improper discharge and exercise thereof.<sup>1</sup>

The better distinction seems to be, that where the wrong act consists in the manner of discharging a rightful duty, the company are liable therefor; but not for a wrong committed apart from and unconnected with any services or duties devolving on him.<sup>2</sup> Thus it is the duty of a railroad company, and of its conductors on trains, to treat passengers justly and humanely, and therefore, we take it, that for an unprovoked assault or other abuse of a conductor, of his own mere malice or passion, on an unoffending passenger, the company would be liable; for the act itself would be in violation of a duty devolving on both himself and his employers—the duty of treating passengers with civility.<sup>3</sup>

And it is the rule in Illinois, at least, that railroad companies are liable for the wanton and malicious perversion of the appliances of the company by their servants, while engaged in the discharge of their duties, and which cause damage to others; such as wantonly and negligently permitting steam to escape, and willfully using the whistle so as to cause damage.<sup>4</sup>

**6. Co-employees.**—As to who are fellow servants, or co-servants, within the meaning of the common law rule that exempts

<sup>1</sup> *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 131; *Passenger Railroad Co. v. Young*, 21 Ohio St. R. 518; *Seymour v. Greenwood*, 7 H. & N. 355. In the case cited from 21 Ohio State, *Railroad Co. v. Young*, the court say: "Where a person is injured by the act of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master." 21 Ohio St. 524.

<sup>2</sup> *Northwestern R. R. Co. v. Hack*, 66 Ill. 238; *Toledo, Wabash & Western Ry. Co. v. Harmon*, and *Chicago, Burlington & Quincy R. R. Co. v. Dickson*, *post*.

<sup>3</sup> *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 9 Am. Ry. Rep. 118.

<sup>4</sup> *Toledo, Wabash & Western Ry. Co. v. Harmon*, 47 Ill. 298; *Chicago, Burlington & Quincy R. R. Co. v. Dickson*, 63 Ill. 151, 7 Am. Ry. Rep. 45. And the same position is held in Tennessee: *Nashville & Chattanooga R. R. Co. v. Starnes*, 9 Heisk. 52, 19 Am. Ry. Rep. 280. But in the absence of proof of knowledge chargeable to the company of the reckless character of the servant, vindictive damages will not be allowed: *Ibid*.

the master or employer from liability for injuries to one from the negligence of the other, there is much diversity of decision. But the weight of authority is, that all who serve the same employer, work under the same control, deriving their authority and compensation from the same source, and engaged in the same business, although it be in different grades and departments thereof, are fellow or co-servants, each taking the risk of the others' negligence.<sup>1</sup> In the language of the Supreme Court of Vermont, "All who are directly engaged in accomplishing the ultimate purpose in view, that is, the running of the road, must be regarded as engaged in the same general business, within the meaning of the rule."<sup>2</sup>

Upon this subject the Supreme Court of Maryland, in *Wonder v. The Baltimore & Ohio R. R. Co.*, hold the following language: "It follows, therefore, that the brakeman on the

<sup>1</sup> *Wonder v. The Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C. 3 Am. R. 143; *Fort v. Union Pacific R. R. Co.*, 2 Dillon's C. C. R. 259; *O'Donnell v. The Allegheny Valley R. R. Co.*, 59 Penn. St. 239; *Robinson v. H. & T. Cent. Ry. Co.*, 46 Tex. 540, 13 Am. Ry. Rep. 303; *Blake v. Maine Cent. R. R. Co.*, 70 Me. 60; *Morgan v. Vale of Neath Ry. Co.*, Law Rep. 1 Q. B. 149; *Lovell v. Howell*, Law Rep. 1 C. P. Div. 161; *Charles v. Taylor*, Law Rep. 3 C. P. Div. 492; *Valtez v. Ohio & Miss. Ry. Co.*, 85 Ill. 500; *McAndrews v. Burns*, 10 Vroom, 117; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich. 510. One voluntarily assisting a servant of a railroad company in a particular emergency, is a co-servant with him, and can not recover for an injury caused by his negligence: *Osborne v. Knox & Lincoln R. R. Co.*, 68 Me. 49, 19 Am. Ry. Rep. 7.

<sup>2</sup> *Hard v. Vermont & Canada R. R. Co.*, 32 Vt. 473; *O'Connell v. Baltimore & Ohio R. R. Co.*, 20 Md. 212; *Wonder v. Balt. & Ohio R. R. Co.*, 32 Md. 418; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 565; *Columbus & Ind.*

*Cent. Ry. Co. v. Arnold*, 31 Ind. 174. *Contra*, *Ryan v. Chicago & Northwestern Ry. Co.*, 60 Ill. 171. But it is said in *Lewis v. St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450, that agents of the road charged with the duty of supplying a safe track and sound machinery, are not servants, but, for the purpose of safely operating the road, they are the corporation itself. And see *Bessex v. Chicago & Northwestern Ry. Co.*, 45 Wis. 477, 18 Am. Ry. Rep. 58; *Brann v. Chicago, Rock Island & Pacific Ry. Co.*, 53 Ia. 595; S. C. 6 N.W. Repr. 5, 21 Am. Ry. Rep. 184; *Hough v. Texas & Pacific Ry. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451. But see, *contra*, *Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245; *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268. It makes no difference, in the application of this principle, whether the work is done by servants or by contractors: *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240; *Cumberland & Penn. R. R. Co. v. State*, 44 Md. 283; *Shanny v. Androscoggin Mills*, 66 Me. 420.

train is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, and with the inspector of the machinery and rolling stock of the road, and the superintendent of the movement of trains." Citing *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49; *Hayes v. Western R. R. Co.*, 3 Cush. 270; *Sherman v. Rochester & Syracuse R. R. Co.*, 17 N. Y. 153; *Ryan v. Cumberland Valley R. R. Co.*, 23 Penn. St. 384; and others.<sup>1</sup> That court then add, that "If, therefore, the defect in the brake that caused the injury in the present instance existed by reason of the neglect or want of care on the part of such employes of the defendant, the latter can not be held liable, unless there has been negligence in the selection of those servants,<sup>2</sup> and the *onus* of proof of such negligence is on the plaintiff."<sup>3</sup>

*Fort v. The Union Pacific Railroad Company*, above cited, DILLON, Justice, holds the following language in reference to fellow servants, and the common law rule of exemption from liability for injuries resulting to one from the negligence of the other, where proper care has been observed in their selection. "And this doctrine has been extended by the English, and by many of the state courts in this country, to all persons serving the same master in the same employment, whether equal, inferior, or superior in grade, to the servant injured, and the fact that the injured servant was under the control of the servant by whose negligence the injury was caused, has been considered to make no difference in the application of the rule." And in the same case, the same learned justice further adds, that "Although the rule, particularly this extension of it, so as to exempt a master for the negligence of a servant within the scope of his employ-

<sup>1</sup> And see *Murphy v. Boston & Albany R. R. Co.*, 59 How. Pr. 197; *Bessel v. N. Y. Cent. & H. R. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Barringer v. Del. & Hudson Canal Co.*, 19 Hun, 216; *Valtez v. Ohio & Miss. Ry. Co.*, 85 Ill. 500; *Chicago & N.W. R. R. Co. v. Moranda*, 93 Ill. 302; *Same v. Bliss*, 6 Bradw. (Ill.), 411; *McGowan v. St. Louis & Iron Mountain R. R. Co.*, 61 Mo. 528; *McAndrews v. Burns*, 10 Vroom, 117; *Zeigler v. Day*, 123 Mass. 152; *Morgan v. Vale of Neath Ry.*

*Co.*, *supra*; *Wilson v. Merry*, Law Rep. 1 H. L. (Scotch), 326. But see *Stevenson v. Jewett*, 16 Hun, 210.

<sup>2</sup> *Wonder v. The Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C. 3 Am. R. 143, 145; *McAndrews v. Burns*, *supra*.

<sup>3</sup> *O'Connell v. Baltimore & Ohio R. R. Co.*, 20 Md. 212; *Shauck v. Northern Cent. Ry. Co.*, 25 Md. 462; *Cumberland Coal & Iron Co. v. Scally*, 27 Md. 589.



ment, who has the control of another servant, for an injury to the latter, caused by his obeying the orders of his superior, has met with much, and perhaps, just and reasonable opposition; yet, it has been so often and so generally decided, that it is doubtful how far a court, whatever may be its own convictions, is at liberty to disregard it." The case here cited, however, being one in which the injury accrued to the inferior while acting in obedience to the orders of his superior, in a different employment than that in which he was employed, the same learned judge, while thus recognizing the general rule in its fullest extent, held that the reason of the rule does not extend to an injury thus received, as the injured servant was only presumed to take into account, in accepting his employment, the ordinary risks of what he undertook to do, and not risks in a different labor which he might be wrongfully ordered to perform.<sup>1</sup>

The case of *Wonder v. The Baltimore & Ohio Railroad Company*, above cited, was an action by an employe, a brakeman, against his employer, the said railroad company, for an injury received by reason of a defect in the machinery which he was, as employe, required to use in the business of his employment. The supposed defect consisted in the use of a hook instead of an eye-bolt on the brake, and in having the point of the hook turned the wrong way. By reason of such defect, plaintiff, in attempting to use the brake, was thrown from the car to the track, and caught between the brake shaft and truck of the car, and dragged, and seriously injured. The negligence alleged against the company was the use of this defective brake. It was shown in evidence to have been the duty of certain other employes of the company "to see that the cars and their appliances were kept in proper order and repair"; and the court held that the negligence in regard to the arrangement of the brake was the negligence of these employes, whose business it was to see that it was kept in proper condition; that their employment in this respect made them fellow servants with the plaintiff; and that in the absence of any proof as to their not being competent in their places, or that any knowledge of such defect of the brake ever came to those having control and general

<sup>1</sup>*Fort v. The Union Pacific R. R. Co.*, 2 Dillon's C. C. R. 262, 263. But see *Hanrathy v. Northern Central Ry. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188.

direction, as superintendents or agents, over the employes, before the injury occurred, the action could not be maintained, as there was also no evidence showing negligence or want of care in the selection of these servants. The court say: "The essential proof of the *gravamen* of the action was wanting, and of course the plaintiff could not recover."<sup>1</sup>

And though the negligent one be of a higher grade of service than that of the servant injured, yet if employed in the same general service, no recovery can be had for the injury against the company, for, upon common law principles, which prevail on this subject in Maryland, the employe in entering the service takes upon himself that risk.<sup>2</sup> The only remedy of the injured party is by an action against the person or fellow servant from whose negligence he suffers the injury.<sup>3</sup>

And it is by no means necessary, in order to constitute a case of liability on the part of the company, master or employer, that the injured servant, and the servant by whose negligence the injury is occasioned, should at the time have been employed in one and the same particular work or part of the general business. It is sufficient if they are employed in the same general and common enterprise or business, for the rendering of service and performing duties for the attainment of the same general purpose, by the co-operating influences of various different parts—as, for instance, if both be employed in the navigating a ship, running of a factory, or operating a railroad. Whenever, in such cases, an injury to one is liable to result from the negli-

<sup>1</sup> 32 Md. 411, 420, 3 Am. R. 143, 147.

<sup>2</sup> O'Connell v. Balt. & Ohio R.R. Co., 20 Md. 221; Shauck v. Northern Central Ry. Co., 25 Md. 462; Robinson v. H. & T. Cent. Ry. Co., 46 Tex. 540, 13 Am. Ry. Rep. 303; O'Connor v. Roberts, 120 Mass. 227; Zeigler v. Day, 123 Mass. 152; Lawler v. Androscoggin R. R. Co., 62 Me. 463; Blake v. Maine Cent. R. R. Co., 70 Me. 60; Malone v. Hathaway, 64 N. Y. 5; Delaware & Hudson Canal Co. v. Carroll, 89 Penn. St. 374; Mobile & M. Ry. Co. v. Smith, 59 Ala. 245; Wilson v. Merry, Law Rep. 1 H. L.

(Scotch), 326; Feltham v. England, Law Rep., 2 Q. B. 33. But in Tennessee it is held that subordinates under the control of a superior are entitled to regard him as representing the master: Nashville & Decatur R. R. Co. v. Jones, 9 Heisk. 27, 19 Am. Ry. Rep. 261; Louisville & Nashville R. R. Co. v. Bowler, *Id.* 866, 20 Am. Ry. Rep. 65.

<sup>3</sup> O'Connell v. Balt. & Ohio R. R. Co., 20 Md. 221; Hinds v. Harbou. 58 Ind. 121; Hinds v. Overacker, 66 Ind. 547; Osborne v. Morgan, 130 Mass. 102; Griffiths v. Wolfram, 22 Minn. 185.

gence of another of such servants—whenever, in the probable course of things, the want of care or the negligence of one of such servants would be calculated to cause an injury to, or to endanger the safety of, another one of such servants, engaged in promoting the same business (whether far off or near by, as to the locality of such service, the rule is the same)—if the persons thus employed have been selected with due care and circumspection, or are competent and proper persons to perform the duties of their respective positions, there is no liability at common law; and if the contrary thereof, as to fitness, competency, or as to care in the selection of such persons, is relied on by plaintiff, he must aver and prove the same.<sup>1</sup>

But if the employer or company know of the defects or insufficiency of the works or appliances, and fail to remedy the same within a reasonable time, and injury results to one of the servants used to being employed, and while employed in the use of or about the same, or in such service as to incur injury, and does incur injury by reason of the same, then the action will lie against the employer for such injury;<sup>2</sup> and so likewise if the employer might have known thereof, by the exercise of proper or reasonable diligence to learn the same.<sup>3</sup> If, however, the injured servant had in that respect the same or equal means of knowledge, or had actual knowledge of such defect or insufficiency of appliances and machinery, or of the unsuitableness of his co-servant, as had the employer, then such injured servant is deemed to have taken upon himself, as part of the terms of his employment, the increased risk and danger occasioned by the same, and therefore can not recover for the injury.<sup>4</sup>

<sup>1</sup> *O'Connell v. Baltimore & Ohio R. Co.*, 20 Md. 212; *Wonder v. The Baltimore & Ohio R. R. Co.*, 32 Md. 411; *S. C. 3 Am. R.* 143, 145; *Coon v. Syracuse & Utica R. R. Co.*, 5 N. Y. 492; *Boldt v. N. Y. Cent. R. R. Co.*, 18 N. Y. 432; *Warner v. Erie Ry. Co.*, 39 N. Y. 478; *Farwell v. Boston & Worcester R. R. Co.*, 4 Met. 49; *Hard v. Vermont & Canada R. R. Co.*, 32 Vt. 473.

<sup>2</sup> *Warner v. Erie Ry. Co.*, 39 N. Y. 478; *Lewis v. St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 495, 8

*Am. Ry. Rep.* 450.

<sup>3</sup> *Noyes v. Smith*, 28 Vt. 63.

<sup>4</sup> *Carle v. Bangor & Piscataquis Canal & R. R. Co.*, 43 Maine, 269; *Buzzell v. Laconia Manf. Co.*, 48 Maine, 113; *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 547; *Frazier v. Penn. R. R. Co.*, 38 Penn. St. 104; *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562; *Moss & others v. Johnson*, 22 Ill. 633. And so with regard to a change in the running of trains: *Robinson v. H. & T. Cent. Ry. Co.*, 46 Tex. 540, 13 *Am. Ry. Rep.* 303.

And it is a well settled principle of law, that if a servant or employe knows of the incompetency, or habitual negligence or other unfitness of a fellow servant, or that the material or means with which he works are defective, or that the necessary appliances are wanting, incomplete, or out of proper condition for the use of the road, and continues his work and service without objection, and without being induced by his employer or master to believe that the necessary change in that respect will be made, he will be deemed to have assumed the risks arising therefrom; for his continuance in such place of danger is purely voluntary, and he thereby waives the right of indemnity for injuries resulting from such deficiencies, incompetency and defects.<sup>1</sup> And so when the servant, without objecting, continues to assist in the performance of the dangerous operation of uncoupling freight cars while the train is in motion, and such practice has become a custom, which the servant himself has assisted by his conduct to establish, and which duty is habitually performed, or else, if exceptional, voluntarily assumed in the particular case by him, he is himself guilty of contributory negligence proximate to the cause of the injury, if accidentally injured in the performance of such act, and can not recover therefor.<sup>2</sup>

The rule of law, as laid down by WRIGHT, Justice, in *Greenleaf v. Illinois Central Railroad Company*, is, substantially, that if the deficiency in the appliances exist at the time of its construction or first use, and thus continue up to the time of the injury, then, to fix liability on the company, no evidence of further notice, actual or implied, is necessary;<sup>3</sup> but that if proper and sufficient originally, and afterward rendered insufficient by accident or wear, then it is to be shown, in order to fix liability therefor, that the company either had notice thereof, or ought to have had by the use of ordinary vigilance and care, and therefore

<sup>1</sup> *Greenleaf, admr., v. Ill. Cent. R. Co.*, 29 Iowa, 14; *Kroy, admr., v. The Chi., R. Island & P. R. R. Co.*, 32 Iowa, 357; *Mad River & Lake Erie R. R. Co. v. Barber*, 5 Ohio St. 562.

<sup>2</sup> *Greenleaf, admr., v. Ill. Cent. R. Co.*, 29 Iowa, 14; *Kroy, admr., v. Chi., R. Island & P. R. R. Co.*, 32 Iowa, 357; *Mad River & Lake Erie R. Co. v. Barber*, 5 Ohio St. 562; *Tim-*

*mons v. Cent. Ohio R. R. Co.*, 6 Ohio St. 105; *Wilson v. City of Charlestown*, 8 Allen, 137; *Felch v. Allen*, 98 Mass. 572; *Hanrathy v. Northern Central Ry. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188.

<sup>3</sup> *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14; S. C. 4 Am. R. 181; *Wonder v. The Baltimore & Ohio R. R. Co.*, 32 Md. 411; S. C. 3 Am. R. 143.

are chargeable therewith. And this we take to be the correct principle in such cases.<sup>1</sup>

A railroad company is not required to change its appliances, machinery or fixtures, in order to apply every new invention, discovery or supposed improvement; and if there be in use such as are less safe than others in general use, yet it does not necessarily follow that to a servant, liability for injury results therefrom.<sup>2</sup> For if, knowing that fact, the servant thinks proper to proceed in his service irrespective thereof, and be not deceived as to the degree of danger incurred, the company will not be liable for injuries resulting from the character of such appliances.<sup>3</sup> And if the familiarity of the servant with the same is such as to give him the means of knowledge, he is then chargeable with a knowledge thereof, if of a character within his comprehension.<sup>4</sup>

Where a conductor, he being the superior officer in control of a train, directs the very act of negligence or rashness to be done by which he receives an injury or comes to his death, no recovery can be had therefor.<sup>5</sup> In the case here cited the court say:

<sup>1</sup> *Greenleaf v. Ill. Cent. R. R. Co.*, 29 Iowa, 14.

<sup>2</sup> *Wonder v. The Baltimore & Ohio R. R. Co.*; 32 Md. 411; S. C. 3 Am. R. 143; *Smith v. St. Louis, Kansas City & Northern R. R. Co.*, 69 Mo. 32; *Cagney v. Hannibal & St. Jos. R. R. Co.*, *Id.* 416; *Baldwin v. Chi., R. I. & P. Ry. Co.*, 50 Ia. 680; *Piper v. N. Y. Cent. & H. R. R. Co.*, 1 Thomp. & C. 290; *Salters v. Del. & Hudson Canal Co.*, 3 Hun, 338; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412; *Osborne v. Knox & Lincoln R. R. Co.*, 68 Me. 49; *Dynen v. Leach*, 26 Law J., N. S., Exch., 221. But see *St. Louis & South Eastern Ry. Co. v. Valirius*, 56 Ind. 511; S. C. 18 Am. Ry. Rep. 116; *Dorsey v. Phillips & C. Const. Co.*, 42 Wis. 583; *Toledo, Wabash & Western Ry. Co. v. Asbury*, 84 Ill. 429.

<sup>3</sup> *Wonder v. Balt. & Ohio R. R. Co.*, *supra*.

<sup>4</sup> *Wonder v. Balt. & Ohio R. R. Co.*, *supra*.

<sup>5</sup> *Dewey v. The Chi. & N. W. R. R. Co.*, 31 Iowa, 373. And see, to same effect, *Hodgkins v. Eastern R. R. Co.*, 119 Mass. 419, 9 Am. Ry. Rep. 271; *Georgia R. R. & Banking Co. v. McDade*, 59 Ga. 73, 18 Am. Ry. Rep. 183. But in Ohio, liability has been adjudged against a railroad company for an injury to an engineer caused by a collision of trains, which collision arose from the conductor's ordering the engineer to proceed with the train out of time. The ruling seems to have been predicated upon the principle that the conductor was the superior officer, whom the engineer must obey, and that the latter was ignorant, while the conductor was informed, of the change of time and place of passing trains. The conductor was considered as representing the principal: *Little Miami R. R. Co. v. Stevens*, 20 Ohio, 416. See, following the Ohio case, *Baltimore & Potomac R. R. Co. v. Jones*, 95 U. S. 439, 14

"The only ground for plaintiff's recovery must be that of negligence on the part of defendant's employes; and here the insuperable difficulty is, that the deceased himself was the superior officer of the train, and directed the very line of conduct which resulted in his death. If this was negligence, it must, of necessity, have been his negligence."<sup>1</sup> And the circumstance that bars are down, or fences out of repair, thereby letting live stock onto the track, by which a train is endangered, does not remove the objection to such recovery, if knowledge of such defect be not brought home to the company a sufficient and reasonable time previous to the injury to enable the company to repair, or unless such defect had existed so long a time as to raise the presumption of such knowledge on the part of the company, followed by like reasonable time for repairs; and even then, if the course directed by the conductor be a dangerous one, and he is injured by reason thereof, it is at his own risk, and there can be no recovery.<sup>2</sup>

But although railroad companies are not bound to the duty of furnishing engines or appliances that are absolutely safe, it devolves on them to use due care and diligence to furnish such.<sup>3</sup> When injury occurs to a servant on account of alleged defects, the burden of proof is on the plaintiff to show negligence in that respect, or want of care and diligence on the part of the corporation, in respect to the use of suitable engines or other appliances involved in the question.<sup>4</sup> The *onus* of proof is not shifted onto

Am. Ry. Rep. 353; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287; *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Lewis*, 33 Ohio St. 196; *Mann v. Oriental Print Works*, 11 R. I. 152. See *Chicago & N. W. Ry. Co. v. Bayfield*, 37 Mich. 205.

<sup>1</sup> 31 Iowa, 376.

<sup>2</sup> *Aylesworth v. The Chi., R. Island & P. Railroad Co.*, 30 Iowa, 459; *Dewey v. The Chi. & N. W. R. R. Co.*, 31 Iowa, 373; *Hilliard v. Chi. & N. W. Ry. Co.*, 37 Ia. 442; *Davis v. Chi., R. I. & P. Ry. Co.*, 40 Ia. 292; *McCormick v. Same*, 41 Ia. 193; *Pittsburgh, Cin. & St. Louis Ry. Co. v. Eby*, 55 Ind. 567; *Toledo, Wabash &*

*Western Ry. Co. v. Nelson*, 77 Ill. 160; *Wheeler v. Erie Ry. Co.*, 2 Thomp. & C. 634; *Lawrence v. Milw., Lake Shore & Western Ry. Co.*, 42 Wis. 326.

<sup>3</sup> *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672, 719.

<sup>4</sup> *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672, 719; *Steffen v. Chi. & N. W. Ry. Co.*, 46 Wis. 259; *Way v. Ills. Cent. R. R. Co.*, 40 Ia. 341; *Price v. Henagan*, 5 Bradw. (Ill.), 234; *Atlanta & Richmond A. L. Ry. Co. v. Campbell*, 56 Ga. 586; *Campbell v. Atlanta & R. R. Co.*, 53 Ga. 488; *Henry v. Staten Island Ry. Co.*, 81 N. Y. 373.

defendant by the fact that an injury has occurred from the alleged defect, or, we may add, from proof of the injury, and of the defect as the cause thereof. The defect must have resulted from the carelessness of the defendant in selecting or using, or in continuing to use, the objectionable article, with knowledge thereof, or such means of knowledge as will charge the party with negligence.<sup>1</sup>

But if the injury to one servant be the result of another of his fellow servant's negligence, in a matter coming within such other servant's vocation or employment, the company, as at common law, are, in Alabama, not liable;<sup>2</sup> and this, too, whether the carelessness to which the injury is attributable be in reference to the use of, or in relation to the manufacture, repair, or original selection of, the defective or unsuitable structure, machinery, or thing in question, if the servant guilty of the alleged negligence or want of care be, in fact, the fellow servant of the one receiving the injury.<sup>3</sup>

It is held in Illinois, that a servant in one department may recover for injuries occasioned by the gross negligence of one in a different and superior department of the company's employment, if the injured party be free from negligence himself in that respect;<sup>4</sup> but not so if both the employees be engaged in the same line of employment, and the appliances used, and co-servant causing the injury, are selected with proper care.<sup>5</sup> Yet if the objection to the appliances or means used be such as merely requires an increased degree of care to avoid injury, this alone will not, by the ruling in said state, involve the company in liability for injuries incurred in their use.<sup>6</sup> So if he, being aware of the defect

<sup>1</sup> *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672, 726; *Ills. Cent. R. R. Co. v. Houck*, 72 Ill. 285; *Toledo, Wabash & Western Ry. Co. v. Moore*, 77 Ill. 217; *Kansas Pac. Ry. Co. v. Salmon*, 11 Kans. 83.

<sup>2</sup> *Walker v. Bolling*, 22 Ala. 294; *Cook & Scott v. Parham*, 24 Ala. 21; *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672, 721.

<sup>3</sup> *Mobile & Ohio R. R. Co. v. Thomas*, 42 Ala. 672.

<sup>4</sup> *Toledo, Wabash & Western Ry. Co. v. O'Connor*, admr., 77 Ill. 391;

*Chi. & N. W. R. R. Co. v. Moranda*, 93 Ill. 302. And so held in Tennessee: *Nashville & Chattanooga R. R. Co., & M. & C. R. Co., v. Carroll*, 6 Heisk. 347, 12 Am. Ry. Rep. 20; *Nashville & Decatur R. R. Co. v. Jones*, 9 *Id.* 27, 19 Am. Ry. Rep. 261.

<sup>5</sup> *Toledo, Wabash & Western Ry. Co. v. Moore*, admr., 77 Ill. 217.

<sup>6</sup> *Indianapolis, Bloomington & Western R. R. Co. v. Flanigan*, 77 Ill. 365; *Baldwin v. Chi., R. I. & P. Ry. Co.*, 50 Ia. 680.

or insufficiency of articles or means used, or of the improper character of co-employees, yet continues in service with such without objection or making the same known to his superiors, he can have no recovery for injuries arising therefrom.<sup>1</sup> He, as employe, assumes, at common law, the ordinary risks of the service when he enters thereon;<sup>2</sup> and if extraordinary ones are discovered by him, he must report the same, with objections, else there is no liability to him from his employers for injuries arising out thereof.<sup>3</sup>

There is a distinction taken, however, in some cases, between the effects of the negligence of a mere co-employe, and that of the corporation itself, or of those principal managers who wield a controlling influence over the same, and over ordinary employes. In those cases it is held, that the principle which requires of railroad companies safe appliances and structures as to their roads, applies as well to the making up and running of trains; and that where injury results from the neglect of those who control the same, in not properly manning the trains, that the injured party, a servant on such train, is entitled to his action.<sup>4</sup> And so if a co-

<sup>1</sup> Indianapolis, Bloomington & Western R. R. Co. *v.* Flanigan, 77 Ill. 365; Toledo, Wabash & Western R. R. Co. *v.* Ingraham, 77 Ill. 309.

<sup>2</sup> Indianapolis, Bloomington & Western R. R. Co. *v.* Flanigan, *supra*.

<sup>3</sup> Indianapolis, Bloomington & Western R. R. Co. *v.* Flanigan, 77 Ill. 365; Toledo, Wabash & Western Ry. Co. *v.* Ingraham, 77 Ill. 309.

<sup>4</sup> *Flike v. The Boston & Albany R. Co.*, 53 N. Y. (8 Sickels), 549; *Malone v. Hathaway*, 64 N. Y. 5; *Besel v. N. Y. Cent. & H. R. R. Co.*, 70 N. Y. 171, 9 Hun, 457; *Fort v. Whipple*, 11 Hun, 586; *Mich. Cent. R. R. Co. v. Dolan*, 32 Mich. 510; *Quincy Mining Co. v. Kitts*, 42 Mich. 34, 9 Repr. 86; *Crutchfield v. Richmond & Danville R. R. Co.*, 76 N. Car. 320, 14 Am. Ry. Rep. 292; *Hardy v. Car. Cent. Ry. Co.*, *Id.* 5, 14 Am. Ry. Rep. 309; *Dobbin v. Richmond & Danville R. R. Co.*, 81 N. Car. 446; *Chicago, Burlington & Quincy R. R. Co.*

*v. McLallen*, 84 Ill. 109, 16 Am. Ry. Rep. 425; *Mullan v. Phil. & S. M. S. Co.*, 78 Penn. St. 25; *Colorado Cent. R. R. Co. v. Ogden*, 3 Col. 499; *Tyson v. S. & N. Ala. R. R. Co.*, 61 Ala. 554. But see *Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245; *Howells v. Landore S. Steel Co.*, Law Rep. 10 Q. B. 62. But the Court of Appeals of New York have refused, in a recent case, to apply this principle to a head conductor having charge of the starting of trains, by whose negligence in the discharge of such duty a brakeman is killed; and held the company not liable: *Rose v. Boston & Albany R. R. Co.*, 58 N. Y. 217; S. C. 9 Am. Ry. Rep. 515. But see *Booth v. Boston & Albany R. R. Co.*, 73 N. Y. 38; *McCosker v. Long Island R. R. Co.*, 21 Hun, 500; S. C. 59 How. Pr. 258. A conductor is not guilty of negligence in obeying an order of an assistant superintendent of the road to run to the next station, although another train is overdue at



servant or employe be detailed to the performance of the duties of principal manager, so that his acts become those of the company, instead of those of a mere under-employe, then an employe of the company, injured by the negligence of the one thus discharging such principal duties, will be entitled to his action, if clear of contributive negligence on his part.<sup>1</sup>

In case of injury by a railroad, it is the duty of the company or its servants to place the injured party in comfortable quarters, if to be found, where he may be cared for, and have medical attendance. This done, the obligation of humanity being thus far properly discharged, the legal duty and obligation of the company ceases therewith; if death be occasioned thereafter by an imprudent removal, the company are not liable therefor.<sup>2</sup>

In Massachusetts it is held that the engine driver, and the man whose duty it is to see that the locomotive engine is in proper order, do not bear such relation to each other as makes them co-employes, in that sense which prevents the one from recovering against the company damages occasioned by the negligence of the other. The driver is not necessarily supposed to be familiar with the other, or to have a knowledge of his personal habits as to carefulness or negligence,<sup>3</sup> and is therefore not required to object to the same as a precedent act of protection to himself, or to quit his employment. Nor will the fact of his own negligence or disobedience of orders in reference to the transaction, preclude him from a recovery, if neither such negligence nor disobedience of orders conduce to the causing of the injury.<sup>4</sup>

And the employment of an engine driver, and a laborer in a carpenter shop, of one and the same company, are held to be so

that point: *C. B. & Q. R. R. Co. v. McLallen*, *supra*.

<sup>1</sup> *Hofnagle v. The New York Cent. & Hudson River R. R. Co.*, 55 N. Y. (10 Sickels), 608.

<sup>2</sup> *Balt. & O. R. R. Co. v. State*, use of Woodward, 41 Md. 268; *Northern Cent. Ry. Co. v. State*, 29 Md. 420.

<sup>3</sup> *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240. And so in Tennessee: *Nashville & Decatur R. R. Co. v. Jones*, 9 Heisk. 27, 19 Am. Ry. Rep.

261; and in Alabama: *Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245. And so as to brakemen and engineers: *Pittsburgh, Ft. Wayne & Chicago Ry. Co. v. Lewis*, 33 Ohio St. 196; *Mobile & M. Ry. Co. v. Smith*, 59 Ala. 245; and brakemen on the same train: *Chicago & Alton R. R. Co. v. Rush*, 84 Ill. 570.

<sup>4</sup> *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240.

dissimilar and separate from each other that the one will not be held responsible for the negligence of the other. A person employed in a carpenter's shop of a railroad company is not presumed to know, nor required to know, of the negligence or negligent habits of those persons entrusted with the handling of engines and running of trains; and therefore the company will be held liable for an injury caused by his gross negligence.<sup>1</sup> And so that of a fireman on a train of cars, and of the person whose duty it is to arrange and attend to what is termed a mail-catcher, placed by the side of the track to aid in transferring the mail bags, is not such common service as makes these two servants of a railroad company co-employees, within that meaning of the term which is necessary to exist to exonerate the company from liability for injuries caused to one of them by the negligence of the other.<sup>2</sup> And while, ordinarily, there must be proof of care on the part of the injured person, or such gross negligence on the part of the company as admits of a recovery regardless of slight negligence of the plaintiff, to justify a recovery, yet the circumstance of a fireman being struck by such mail-catcher in the darkness of night, at a place where his duty required him to put his head out to look for signals, will, in the absence of other proof, be *prima facie* evidence of care on his part.<sup>3</sup>

The fact that several lines of road connect with each other, and sell tickets and contract for freights through and over all the several lines, there being a diversity of fares of the several roads, with coupons of tickets representing the same, does not constitute an employe on one of such lines an employe of another thereof, or of the whole, in such manner and effect as to bring him, in case of injury from a line other than the one directly employed on, within the principle that one employe can not recover of his employer for an injury inflicted by the negligence of a co-employe.<sup>4</sup> If, however, the plaintiff, by his own

<sup>1</sup> Chi. & Alton R. R. Co. v. Keefe, 47 Ill. 110; Lator v. C., B. & Q. R. Co., 52 Ill. 401; Ryan v. Chi. & N. W. Ry. Co., 60 Ill. 171. And see McKnight v. Iowa & Minn. R. R. Const. Co., 43 Ia. 406, 14 Am. Ry. Rep. 465.

<sup>2</sup> C., B. & Q. R. R. Co. v. Gregory, adm'r, 58 Ill. 272.

<sup>3</sup> C., B. & Q. R. R. Co. v. Gregory, adm'r, 58 Ill. 272.

<sup>4</sup> Carroll v. The Minnesota Valley R. Co., 13 Minn. 30. And see Swainson v. Northeastern Ry. Co., Law Rep. 3 Exch. Div. 341, 18 Am. Ry. Rep. 569; Warburton v. Great Western Ry. Co., Law Rep. 2 Exch. 30.

negligence, contributes to bring about the injury, he can not recover, unless the wrong be intentional.<sup>1</sup>

Where one railroad company uses and runs upon the track of another company, by leave of the latter, a switch-tender on the road so used is not a servant of the company using it, or a fellow servant of its engineers operating on its locomotives; and therefore an engineer of the latter, if injured by reason of the negligence of such switch-tender, is entitled to recover for the injury against the company employing the switchman, if there be no negligence on the part of the injured person.<sup>2</sup>

And where the action is for a personal injury, and a defense is set up that the injured person was, at the time of the injury, an employe of the company, and was injured in the business of his employment, thus relying on the common law principle to avoid a recovery, evidence to the jury is proper to show, or tending to show, that the plaintiff, though a servant of the company, was nevertheless, at the time of the injury, a passenger on the train upon which he was injured; that he was rendering his service elsewhere than on the train, and was, by the terms of his engagement, being carried back and forth daily to and from his work as part of the compensation for his service, and was therefore a paying passenger on the train at the time of receiving the injury.<sup>3</sup>

A contractor of a railroad corporation, to whom a work of the corporation is let for construction, is the principal of the persons whom he employs on the work, and not the railroad com-

<sup>1</sup> *Carroll v. The Minnesota Valley R. R. Co.*, 13 Minn. 30, 34; *McMahon v. Davidson*, 12 Minn. 372.

<sup>2</sup> *Smith, adm'x, v. New York & Harlem R. R. Co.*, 19 N. Y. (5 Smith), 127; *S. C. 6 Duer*, 225; *Vose v. Lancashire & Y. Ry. Co.*, 2 Hurl. & N. 728; *Warburton v. Great W. Ry. Co.*, *supra*; *Swainson v. N. E. Ry. Co.*, *supra*. See *Nashville & Chattanooga R. R. Co.*, and *M. & C. R. R. Co.*, *v. Carroll*, 6 Heisk. 347, 12 Am. Ry. Rep. 20, where it is held that if, in such case, the train be under the exclusive control of the using company, it is liable for all damages occurring through

negligence; but if under the joint control of servants of both companies, then both are liable. And see, also, *Mulherrin v. Delaware, Lackawanna & Western R. R. Co.*, 81 Penn. St. 366, 15 Am. Ry. Rep. 456, decided under the Pennsylvania statute of April 4, 1868 (Pamph. L. 58), providing that if an employe be injured by another company, the right of action should be the same as if he were an employe of the company in fault. In the case cited, the plaintiff was held to come within the statute.

<sup>3</sup> *O'Donnell v. The Allegheny R. R. Co.*, 50 Penn. St. R. 490.

pany; and if his character for skillfulness or carefulness is to be ascertained as a matter of care and prudence, it is for those whom he employs in his service, and not the railroad company, to inquire into it.<sup>1</sup> One who employs a contractor to erect a building, or to do any other job of work, does not become a guarantor, to the employes of such contractor, for his skill or care in performing the work.<sup>2</sup>

And where, by the terms of the contract, the contractor undertakes to do a work in "accordance with the plans, specifications and instructions furnished" by the company, the term "instructions" is to be construed as having reference "to the kind of structure, design, materials, combinations, and all other matters pertaining to the planning of the building to be erected"<sup>3</sup>; but the method or means of accomplishing this work thus undertaken by the contractor, is a matter to be left to the contractor's own skill and judgment, and for which the company are in nowise responsible; and, therefore, for an injury to one of the contractor's employes, growing out of the contractor's unfitness for, and manner of, performing the work, the company are not liable.<sup>4</sup>

The Supreme Court of Tennessee, while it fully recognizes as law the general principle of the English and American cases, that the employer is not liable for injuries inflicted on, or suffered by, a servant or employe, from the negligence of a co-servant or co-employe of the injured person,<sup>5</sup> nevertheless hold that the exceptions arising out of different grades of service apply to cases of injury to a mere laborer on the track, caused by the negligence of the director or dispatcher of trains; and that an injury to such laborer, occasioned by being run against by a train sent over the road out of schedule time, and unknown to the laborer, is within such exception to the general rule, and therefore the company is liable.<sup>6</sup>

<sup>1</sup> *Hunt v. The Pennsylvania R. R. Co.*, 51 Penn. St. 475. But see, *contra*, *Kansas Pacific Ry. Co. v. Little*, 19 Kans. 267, 17 Am. Ry. Rep. 455.

<sup>2</sup> *Hunt v. The Pennsylvania R. R. Co.*, 51 Penn. St. 475.

<sup>3</sup> *Hunt v. Pennsylvania R. R. Co.*, 51 Penn. St. 475.

<sup>4</sup> *Hunt v. Pennsylvania R. R. Co.*,

51 Penn. St. 475. And see *Central R. R. & Banking Co. v. Grant & O'Hara*, 46 Ga. 417, 11 Am. Ry. Rep. 427.

<sup>5</sup> *Ragsdale v. Memphis & Charleston R. R. Co.*, 59 Tenn. 426, 20 Am. Ry. Rep. 182.

<sup>6</sup> *Haynes v. The East Tenn. & Georgia R. R. Co.*, 3 Cold. 222—citing, and relying on, as authority, *The*

In Iowa, it is held that a person employed as a section man upon a railroad, whose labor consists in assisting to repair and keep in order the railroad track, and who goes and comes with others, his co-employees in the work, riding upon a hand-car upon the track, is an employe of the company, within the meaning of the statute rendering railroad corporations liable for injuries received by one employe by reason of the negligence of another.<sup>1</sup> And in Missouri it is held that a section foreman is, for the purpose of keeping the track in repair, the company itself; that notice to him of defects in the road-bed, is notice to the company; and that his negligence is the negligence of the company, for the consequences of which, in injuring a brakeman engaged in coupling cars, the company is liable.<sup>2</sup>

Louisville & Nashville R. R. Co. v. Collins, 2 Duvall (Ky.), 114. And see Nashville & Chattanooga R. R. Co., and M. & C. R. R. Co., v. Carroll, 6 Heisk. 347, 12 Am. Ry. Rep. 20; Nashville & Decatur R. R. Co. v. Jones, 9 Heisk. 27, 19 Am. Ry. Rep. 161; McKnight v. Iowa & Minn. R. R. Const. Co., 43 Ia. 406, 14 Am. Ry. Rep. 465. A laborer, employed by a contractor in repairing a railroad, and a superintendent of the company who oversees such work, are not fellow servants: Cook v. Hannibal & St. Joseph R. R. Co., 63 Mo. 397, 20 Am. Ry. Rep. 177. In Iowa, it is held that a detective, employed to go upon and along the track for the purpose of discovering persons in the act of obstructing it, is a co-servant with an engineer: Pyne v. C., B. & Q. R. R. Co., 54 Ia. 223; S. C. 6 N. W. Repr. 281, 21 Am. Ry. Rep. 229. But for an injury occurring through the negligence of the engineer, an action may be maintained under the Iowa Code, Sec. 1307: *Ibid.* But see Chicago & N. W. R. R. Co. v. Moranda, 93 Ill. 302, where the company was held liable for an injury to a track laborer by being struck by a lump of coal, thrown from a train by a fire-

man. Also Same Company v. Bliss, 6 Bradw. (Ill.), 411; Toledo, Wabash & Western Ry. Co. v. O'Connor, 77 Ill. 391. See *contra*, however, Ross v. N. Y. Cent. & Hudson River R. R. Co., 5 Hun, 488; Kumler v. Junction R. R. Co., 33 Ohio St. 150; Tunney v. Midland Ry. Co., Law Rep. 1 C. P. 291.

<sup>1</sup> Frandsen v. C., R. I. & P. R. R. Co., 36 Iowa, 372. And see Mobile & M. Ry. Co. v. Smith, 59 Ala. 245; Zeigler v. Day, 123 Mass. 152; Barringier v. Del. & Hudson Canal Co., 19 Hun, 216; Crispin v. Babbitt, 81 N. Y. 516; Hamilton v. Iron Mountain Co., 4 Mo. App. 564.

<sup>2</sup> Lewis v. St. Louis & Iron Mountain R. R. Co., 59 Mo. 495, 8 Am. Ry. Rep. 450; Devany v. Vulcan Iron Works, 4 Mo. App. 236; Whalen v. Centenary Church, 62 Mo. 326; Cook v. Hannibal & St. Joseph R. R. Co., 63 Mo. 397. And in Wisconsin the same principle is applied to a yard master: Bessex v. Chicago & North Western Ry. Co., 45 Wis. 477, 18 Am. Ry. Rep. 58. See, also, Louisville & Nashville R. R. Co. v. Bowler, 9 Heisk. 866, 20 Am. Ry. Rep. 65; Stevenson v. Jewett, 16 Hun, 210.

An employe of a railroad company can not recover of the company damages for injuries caused by his own negligence in the course of his employment; hence, where a brakeman is killed by reason of a defect in that portion of the brake immediately under his own eye and supervision, and which it was his duty to keep, or have kept, in order, there can be no recovery against the company for the death.<sup>1</sup>

The death of an employe pending his action for injuries, and when he has recovered judgment below, which has been reversed on appeal by an intermediate court, will not abate the action. By the recovery in his life-time, his claim for damages becomes merged in the judgment, and the action of reversal by the intermediate tribunal merely suspends the judgment until final action by the court of last resort.<sup>2</sup>

**7. Engagement and compensation of employes.**—No official action of the board of directors of a railroad corporation is essential to procure, or direct, the labor of one as servant or employe.<sup>3</sup> And where there is no special agreement as to the amount of the compensation to be made to the employe, officer or servant of the company, and services are rendered at its request, then the rule of compensation fixes the amount that the services are worth.<sup>4</sup> If there be a question between the plaintiff and the company, involved in the case, as to whether there was a special contract at a fixed price, then conversations of the plaintiff and the officers or agents of the company, tending to show that fact, or the contrary thereof, may go in evidence.<sup>5</sup>

<sup>1</sup> Ill. Cent. R. R. Co. v. Jewell, 46 Ill. 99. The rule that a master is not liable for injuries sustained by one servant through the negligence of another servant, does not apply where the servant, at the time of the injury, is not acting in the service of the master: Washburn v. Nashville & Chattanooga R. R. Co., 3 Head, 638; Hutchinson v. York, N. & B. Ry. Co., 5 Exch. 343; Tunney v. Midland Ry. Co., Law Rep., 1 C. P. 291.

<sup>2</sup> Lewis v. St. L. & I. M. R. R. Co., *supra*.

<sup>3</sup> Bee v. San Francisco & Humboldt Bay R. R. Co., 46 Cal. 248; Hooker v.

Eagle Bank, 30 N. Y. 83; Chicago & North Western Ry. Co. v. James, 22 Wis. 194.

<sup>4</sup> Bee v. San Francisco & Humboldt Bay R. R. Co., 46 Cal. 248. And this is so, even where the charter requires the compensation to be fixed by the board of directors, if they neglect to do so: Rogers v. Hastings & Dakota Ry. Co., 22 Minn. 25, 19 Am. Ry. Rep. 412. See, also, Missouri River R. R. Co. v. Richards, 8 Kans. 101.

<sup>5</sup> Bee v. San Francisco & Humboldt Bay R. R. Co., 46 Cal. 248. Where a president of a railroad company afterward became a member of a construc-

Under the sixty-third section of the corporation act of New Jersey, giving laborers a first lien for their wages upon the assets of a corporation in case of its insolvency, it is held that the lien attaches as of the date which the court adjudges to be the time when the insolvency occurred which gives it jurisdiction.<sup>1</sup> One not in the employ of the corporation at such time, though having a claim for wages, is not within the policy of the act.<sup>2</sup> But the presentation of a claim embracing other items than wages, or the proving of a claim for an excessive amount, or the acceptance of a note (unless the intention is manifest), does not forfeit the lien.<sup>3</sup> It makes no difference that the wages accrued long before the insolvency; one in the company's employ at that time is entitled to his lien for the full amount due him, but not for the interest accruing before the lien attaches.<sup>4</sup>

Employees of a railroad company which goes into the hands of a receiver are not creditors at large;<sup>5</sup> but mortgagees seeking to foreclose will be required to satisfy such claims out of the future earnings of the road, or out of the trust property.<sup>6</sup> A preference in derogation of the right of creditors to be paid equally should not be extended by construction;<sup>7</sup> thus where such preference is given to employees, it will not be extended to one furnishing the labor or services of others under a contract to perform the whole, or a certain part, of the business of a corporation. Such a person is not an employee, but a contractor;

tion company formed to complete the road, and which took all its assets, assumed its debts, and paid its claims, and the railroad afterward became merged into another road, against which the president brought suit to recover for the value of his services, as president, in procuring the right of way, etc., performed during the time he was a member of such construction company, it was held he could not recover, for the reason that he, as such member of the construction company, had assumed the payment of such services: *Nebraska Ry. Co. v. Lett*, 8 Neb. 251, 20 Am. Ry. Rep. 364.

<sup>1</sup> Delaware, Lackawanna & Western

R. R. Co. v. Oxford Iron Co., 33 N. J. Eq. 192; S. C. 1 Am. & Eng. R. R. Cas. 205.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Duncan v. Trustees of Chesapeake & Ohio R. R. Co.*, Cir. Ct., city of Richmond, Va., Feby. term, 1876, 9 Am. Ry. Rep. 386.

<sup>6</sup> *Duncan v. Trustees, etc.*, *supra*; *Douglass v. Cline*, 12 Bush, 608, 18 Am. Ry. Rep. 273.

<sup>7</sup> *Lehigh Coal & Nav. Co. v. Central R. R. Co. of N. J.*, 29 N. J. Eq. 252, 18 Am. Ry. Rep. 207.

and the right is conferred only upon the person actually and personally performing the labor or service.<sup>1</sup>

**8. Liability for injury to, if engaged outside their usual employment.**—If an employe of a railroad company be ordered from his ordinary employment for which he is engaged, and placed in a different and more hazardous one, by those of the company's agents, officers or servants having him under their control, and in the course of such more hazardous employment he be injured, the company will be liable to respond therefor, if he has himself been free from blame or carelessness contributing to bring about the injury, although the injury may have resulted from the negligence or want of care of his fellow servant or co-servants, so called, in such employment.<sup>2</sup>

Employes going outside of their regular employment, and of their own volition engaging in other parts of the business of the company, are, if injured whilst so engaged, injured in their own wrong, and have no right of action or remedy against the company—as, for instance, a conductor, engaged of his own mere will in coupling cars. They must be wholly without fault, to be entitled to an action, provided the company is not wanting in proper care and diligence in respect to the cause of the injury.<sup>3</sup> And so, if the injury result in death, and suit is by the widow, under the Georgia statute, the deceased must have been without fault.<sup>4</sup>

When a servant proceeds in the ordinary course of his duty to which he has been assigned, with the consent and acquiescence of his superior, and in the absence of instructions to the contrary, he is not chargeable with negligence in case of accident.<sup>5</sup>

<sup>1</sup>L. C. & N. Co. v. Cent. R. R. Co.

<sup>2</sup>Chi. & Great Eastern Ry. Co. v. Harney, 28 Ind. 28; Lalor, adm'r, v. Chicago, Burlington & Quincy R. R. Co., 52 Ill. 401; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Hurst v. C., R. I. & P. R. R. Co., 49 Ia. 76; Mann v. Oriental Print Works, 11 R. I. 152. See Hawley v. Northern Cent. Ry. Co., 17 Hun, 115.

<sup>3</sup>Campbell v. The Atlanta & Richmond A. L. R. R. Co., 53 Geo. 488. And see Hanrathy v. Northern Central Ry. Co., 46 Md. 280, 18 Am. Ry. Rep.

188; Lake Shore & Mich. Southern Ry. Co. v. Knittel, 33 Ohio St. 468. But if an emergency exist, it is otherwise, if the employe act in good faith: Central R. R. & Banking Co. v. Sears, 59 Ga. 436, 18 Am. Ry. Rep. 100.

<sup>4</sup>Rowland v. Cammon, 35 Geo. 105; Thompson v. The Central R. R. & Banking Co., 54 Geo. 509; *ante*, chap. 56, subd'n 2. But he is presumed to be without fault until the contrary is shown: *Ib.*

<sup>5</sup>Sprong v. Boston & Albany R. R. Co., 58 N. Y. 56, 9 Am. Ry. Rep. 475.



Thus where a head brakeman was killed by a collision while riding upon an engine, and it appeared that his duties frequently required him to ride there; that it was the usual custom on that road, and done with the knowledge of, and without objection by, his superior, it was held that the non-observance of printed rules against so leaving his post, of which it did not appear he had notice, was not a violation of duty.<sup>1</sup> It is for the jury to say, in such case, whether the deceased is rightfully upon the engine.<sup>2</sup>

**9. Are entitled to safe materials and structures.**—The employes of railroad corporations are entitled to have, and it is the duty of such companies to furnish, safe materials and structures; and they must in the first instance properly construct their roads, with all the necessary appurtenances, and thereafter keep the same in proper repair, and free from obstructions. For a failure therein, they are liable to employes for injuries and damages caused by reason of such omissions,<sup>3</sup> unless the defects

<sup>1</sup> *Sprong v. B. & A. R. R. Co.*, *supra*.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Illinois Cent. R. R. Co. v. Welch*, 52 Ill. 183; *Chi. & N. W. R. R. Co. v. Swett*, 45 Ill. 201; *Toledo, Wabash & Western Ry. Co. v. Asbury*, 84 Ill. 429; *Indianapolis & St. Louis R. R. Co. v. Estes*, 96 Ill. 470; S. C. 1 Am. & Eng. R. R. Cas. 622; *Harrison v. Central R. R. Co.*, 2 Vroom (N. J.), 293; *Paulmier v. The Erie R. R. Co.*, 5 Vroom (N. J.), 151; *Western & Atlantic R. R. Co. v. Bishop*, 50 Geo. 465; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; S. C. 1 Am. & Eng. R. R. Cas. 145; *Wedgwood v. Chicago & North Western Ry. Co.*, 44 Wis. 44, 19 Am. Ry. Rep. 393; *Bessex v. Chicago & North Western Ry. Co.*, 45 Wis. 477, 18 Am. Ry. Rep. 58; *Stetler v. C. & N. W. Ry. Co.*, 49 Wis. 609; S. C. 6 N. W. Repr. 303, 21 Am. Ry. Rep. 89; S. C. 46 Wis. 497, 21 Am. Ry. Rep. 402; *Cumberland & Penn. R. R. Co. v. The State*, for use, etc., 37 Md. 156; *Same v. State*, for use of *Moran*, 44 Md. 283; *East*

*Tenn., Va. & Ga. R. R. Co. v. Hodges*, 15 Am. Ry. Rep. 174; *St. Louis & South Eastern Ry. Co. v. Valirius*, 56 Ind. 511, 18 Am. Ry. Rep. 116; *Hough v. Texas & Pacific Ry. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449; *Leonard v. Collins*, 70 N. Y. 90; *Besel v. N. Y. Cent. & H. R. R. R. Co.*, 70 N. Y. 571; *Fuller v. Jewett*, 80 N. Y. 46; S. C. 1 Am. & Eng. R. R. Cas. 109; *Kain v. Smith*, 80 N. Y. 458; *Cone v. Del., Lack. & Western R. R. Co.*, 81 N. Y. 206; S. C. 15 Hun, 172; *King v. N. Y. Cent. & H. R. R. R. Co.*, 4 Hun, 769; *Stevenson v. Jewett*, 16 Hun, 210; *DeForest v. Jewett*, 19 Hun, 509; *Lake Shore & Mich. Southern Ry. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Harkins v. Standard Sugar Refinery*, 122 Mass. 400; *Lovejoy v. Boston & Lowell R. R. Co.*, 125 Mass. 79; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Cooper v. Cent. R. R. Co.*, 44 Ia. 134; *Dale v. St. Louis, Kansas City & Northern Ry. Co.*, 63 Mo. 455, 21 Am. Ry. Rep. 217; *Bridges v. St. Louis, Iron Mountain & S. R. R. Co.*, 6 Mo. App. 389;

causing the injury were well known to the employe, and had been for a reasonable time in which to object thereto, and no objections or notice as to the same were made to his superiors; for then there can be no recovery.<sup>1</sup>

McMillan v. Union Press Brick Works, *Id.* 434; Colorado Cent. R. R. Co. v. Ogden, 3 Col. 499; Houston & Tex. Ry. Co. v. Oram, 49 Tex. 341; Baker v. Allegheny Valley R. R. Co., 95 Penn. St. 211; S. C. 10 Repr. 672; LeClair v. First Div. St. Paul & Pac. R. R. Co., 20 Minn. 9. This power can not be delegated to an agent, so as to relieve the company from responsibility: Booth v. Boston & Albany R. R. Co., 67 N. Y. 593; S. C. 73 N. Y. 38; Besel v. N. Y. C. & H. R. R. Co., *supra*; Kirkpatrick v. Same, 79 N. Y. 240; Harvey v. Same, 19 Hun, 556; Harkins v. Stand. Sug. Refy., *supra*; Houston & Tex. Cent. R. W. Co. v. Dunham, 49 Tex. 181; Bridges v. St. L., I. M. & S. R. R. Co., *supra*. But the company is not bound to use the best implements, the best machinery, and the best methods: Mich. Cent. R. R. Co. v. Smithson, 45 Mich. 212; S. C. 1 Am. & Eng. R. R. Cas. 101; Smith v. St. Louis, Kansas City & Northern Ry. Co., 69 Mo. 32; Cagney v. Hannibal & St. Joseph R. R. Co., *Id.* 416; Baldwin v. C., R. I. & P. R. R. Co., 50 Ia. 680; Salters v. Del. & Hudson Canal Co., 3 Hun, 338; Dynen v. Leach, 26 L. J. (N. S.), Exch., 221. But see Smith v. N. Y. & Harlem R. R. Co., 19 N. Y. 127; S. C. 6 Duer, 225; Dorsey v. Phillips & Colby Const. Co., 42 Wis. 583, 15 Am. Ry. Rep. 143; Toledo, Wabash & Western Ry. Co. v. Asbury, 84 Ill. 429. They may use worn and defective machinery and cars, if the employe know of it, and do not object: Kelley v. Silver Spring B. & D. Co., 12 R. I. 112; Fort Wayne, J. & S. R. R. Co. v. Gildersleeve, 33 Mich. 133; Mich. Cent. R.

R. Co. v. Austin, 40 Mich. 247; International & Great Northern R. R. Co. v. Doyle, 49 Tex. 190. And by the case of Paulmier v. Erie R. R. Co., *supra*, when the injury of an employe is owing partly to the negligence of the company itself, and partly to that of a co-employe, the injured party may recover; and so in Mad River & Lake Erie R. R. Co. v. Barber, 5 Ohio St. 541. But the company is not liable unless the neglect to provide proper and safe materials be the proximate cause of the injury: Williams v. Central R. R. of Ia., 43 Ia. 396, 14 Am. Ry. Rep. 458; Crutchfield v. Richmond & Danville R. R. Co., 78 N. Car. 300, 16 Am. Ry. Rep. 212; Wedgwood v. Chicago & North Western Ry. Co., 44 Wis. 44, 19 Am. Ry. Rep. 393. Defendant's negligence in this respect is a question for the jury: Kans. Pac. Ry. Co. v. Salmon, 11 Kans. 83; S. C. 14 Kan. 512; Hawley v. Northern Cent. Ry. Co., 17 Hun, 115; S. C. 11 N. Y. W. D. 71; Kirkpatrick v. N. Y. Cent. & H. R. R. Co., 79 N. Y. 240; Brann v. Chicago, Rock Island & Pacific Ry. Co., 53 Ia. 595; S. C. 6 N. W. Repr. 5, 21 Am. Ry. Rep. 184; Lake Shore & Mich. Southern Ry. Co. v. Fitzpatrick, 31 Ohio St. 479; Brabbitts v. C. & N. W. Ry. Co., 38 Wis. 289; Wedgwood v. C. & N. W. Ry. Co., *supra*; Kelley v. Chicago, Milwaukee & St. Paul Ry. Co., 50 Wis. 381; S. C. 7 N. W. Repr. 291; McMillan v. Union P. B. Works, 6 Mo. App. 434; Houston & Great Northern R. R. Co. v. Randall, 50 Tex. 254; Woodley v. Met. Dist. Ry. Co., Law Rep., 2 Ex. Div. 384.

<sup>1</sup>Mad River & Lake Erie R. R. Co. v. Barber, 5 Ohio St. 541; Western &

It is held in Indiana that an injury incurred by an employe engaged in running a train upon a railroad, occasioned partly by the road being "too rough," and partly by a defect in an axle, all of which was negligently and carelessly permitted by the company, is actionable against the company; and that it is not necessary, in such case, to aver or show, in the first place, ignorance thereof on the part of the plaintiff, up to the time of injury; but that if known to him, it is for the company to show that fact in defense; and to do so, it should plead the same.<sup>1</sup>

Employes are held to have taken the risks naturally incident to their employment, not occasioned by negligence of the company; and as between the company and its servants, there is not generally an implied warranty of the fitness of the road or rolling

*Atlantic R. R. Co. v. Bishop*, 50 Geo. 465; *Central R. R. & Banking Co. v. Kenney*, 58 Ga. 485, 16 Am. Ry. Rep. 131; *LeClair v. St. Paul & Pac. R. R. Co.*, 20 Minn. 9; *Balt. & O. R. R. Co. v. State*, use *Woodward*, 41 Md. 268; *Way v. Illinois Central R. R. Co.*, 40 Ia. 341, 8 Am. Ry. Rep. 400; *Toledo, Peoria & Warsaw Ry. Co. v. Conroy*, 61 Ill. 162, 12 Am. Ry. Rep. 431; *Chicago & Ia. R. R. Co. v. Russell*, 91 Ill. 298; *Crutchfield v. Richmond & Danville R. R. Co.*, 76 N. Car. 320, 14 Am. Ry. Rep. 292; *Hardy v. Carolina Cent. Ry. Co.*, *Id.* 5, 14 Am. Ry. Rep. 309; *Crutchfield v. Richmond & Danville R. R. Co.*, 78 N. Car. 300, 16 Am. Ry. Rep. 212; *Dale v. St. L., K. C. & N. Ry. Co.*, *supra*; *Gibson v. Erie Ry. Co.*, 63 N. Y. 449, 5 Hun, 31; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, 9 Am. Ry. Rep. 273; *Lovejoy v. Boston & Lowell R. R. Co.*, 125 Mass. 79. The company is bound to notify the employe of defects or dangers within their knowledge: *O'Connor v. Adams*, 120 Mass. 427; *Lake Shore & Mich. Southern Ry. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Chicago & N. W. Ry.*

*Co. v. Bayfield*, 37 Mich. 205; *Costello v. Judson*, 21 Hun, 396. And a similar responsibility rests upon the employe, as to defects within his knowledge: *Richardson v. Cooper*, 88 Ill. 270; *Johnson v. Richmond & Danville R. R. Co.*, 81 N. Car. 453. But there must be positive knowledge, or reasonable means of attaining it, of the precise danger assumed, not vague surmises of the possibility of danger: *Dorsey v. Phillips & Colby Const. Co.*, 42 Wis. 583, 15 Am. Ry. Rep. 148; *Dale v. St. L., K. C. & N. Ry. Co.*, *supra*. Such knowledge is a question for the jury: *Ibid.*; *Hawley v. Northern Cent. R. W. Co.*, 17 Hun, 115.

<sup>1</sup>*Indianapolis & Cin. R. R. Co. v. Klein*, 11 Ind. (Tanner), 38; and *Indianapolis & Cin. R. R. Co. v. Love*, 10 Ind. 554, adverted to and reaffirmed. But the company is not chargeable with negligence in using "double buffers": *Baldwin v. Chicago, Rock Island & Pac. R. R. Co.*, 50 Ia. 680; *Indianapolis, Bloomington & Western R. R. Co. v. Flanigan*, 77 Ill. 365.

stock.<sup>1</sup> The company is bound only to exercise ordinary care to prevent an injury.<sup>2</sup>

If there be a defect, and it be known to the company, and it place a servant on the road who is in ignorance thereof, and he be injured by reason of such defect, he being himself free from negligence or fault, and it not being such a defect as he is presumed to have known, the company will be liable;<sup>3</sup> but if both parties have knowledge of such defect, or if the servant alone know of it, and in either case the servant continue in the use of it without objection, and is injured, he can not recover.<sup>4</sup>

<sup>1</sup> *Hough v. Texas & Pacific Ry. Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451; *Indianapolis & Cin. R. R. Co. v. Love*, 10 Ind. (Tanner), 554; *Nashville & Decatur R. R. Co. v. Jones*, 9 Heisk. 27, 19 Am. Ry. Rep. 261; *Grand Rapids & Ind. R. R. Co. v. Huntley*, 38 Mich. 537; *Chicago & Alton R. R. Co. v. Platt*, 89 Ill. 141; *Indianapolis, Bloomington & Western Ry. Co. v. Toy*, 91 Ill. 474; *Morris v. Gleason*, 1 Bradw. (Ill.), 510; *Chicago & Alton R. R. Co. v. Mahoney*, 4 Bradw. (Ill.), 262; *Chicago & N. W. R. R. Co. v. Scheuring*, *Id.* 533; *North Chicago Rolling Mills Co. v. Monka*, *Id.* 664; *Price v. Henagan*, 5 Bradw. 234; *Colorado Cent. R. R. Co. v. Ogden*, 3 Col. 499; *Conway v. Ill. Cent. R. R. Co.*, 50 Ia. 465; *Smith v. St. Louis, Kansas City & Northern Ry. Co.*, 69 Mo. 32; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66, 9 Repr. 549; *Balt. & Ohio R. R. Co. v. Stricker*, 51 Md. 47; *Leonard v. Collins*, 70 N. Y. 90; *De Graff v. N. Y. Cent. & H. R. R. Co.*, 76 N. Y. 125; S. C. 3 Thomp. & C. 255; *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; *Potts v. Port Carlisle D. & Ry. Co.*, 2 Law Times, N. S., 283. See *contra*, *Lewis v. St. Louis & Iron Mountain R. R. Co.*, 59 Mo. 495, 8 Am. Ry. Rep. 450.

<sup>2</sup> *Locke v. S. C. & P. Ry. Co.*, 46 Ia. 109, 16 Am. Ry. Rep. 138; *N. & D. R. R. Co. v. Jones*, *supra*; *Hough v.*

*Railroad Co.*, *supra*; *Central R. R. Co. v. Mitchell*, 63 Ga. 173; S. C. 1 Am. & Eng. R. R. Cas. 145; *DeForest v. Jewett*, 19 Hun, 509.

<sup>3</sup> *Indianapolis & Cin. R. R. Co. v. Love*, 10 Ind. (Tanner), 554; *Lewis v. St. L. & I. M. R. R. Co.*, *supra*; *Chicago & Alton R. R. Co. v. Platt*, 89 Ill. 141. Knowledge on the part of the company will be presumed from lapse of time: *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268; *Chicago & Ia. R. R. Co. v. Russell*, 91 Ill. 298; *Bridges v. St. Louis, Iron Mountain & Southern R. R. Co.*, 6 Mo. App. 389.

<sup>4</sup> *Indianapolis & Cin. R. R. Co. v. Love*, 10 Ind. (Tanner), 554; *Way v. Illinois Central R. R. Co.*, 40 Ia. 341, 8 Am. Ry. Rep. 400; *Dale v. St. L., K. C. & N. Ry. Co.*, 63 Mo. 455, 21 Am. Ry. Rep. 217; *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, 9 Am. Ry. Rep. 273. And the burden of proof is on the plaintiff to establish negligence of the defendant, and ordinary care by himself: *Henry v. Staten Island Ry. Co.*, 81 N. Y. 373; S. C. 10 N. Y. Wkly. Dig. 430; *Way v. Ill. Cent. R. R. Co.*, *supra*; *Belair v. Chicago & N. W. R. R. Co.*, 43 Ia. 662, 14 Am. Ry. Rep. 575; *Price v. Henagan*, 5 Bradw. (Ill.), 234; *Campbell v. Atlanta & Richmond A. L. R. R. Co.*, 53 Ga. 488; *Atlanta & R. Ry. Co. v. Campbell*, 56 Ga. 586. But mere knowledge of the defects by the

But although it is ordinarily the duty of railroad companies to furnish safe appliances, cars and machinery, for their employes, and in default thereof they are liable for injuries resulting from such default, yet this rule of law does not apply to cases where employes and servants of railroad companies are engaged in removing damaged cars upon a railroad for the purpose of having them repaired, and the fact of their damaged condition is known to such servants and employes.<sup>1</sup>

employe will not, without some proof of negligence, defeat his recovery: *Lewis v. St. L. & I. M. R. R. Co.*, *supra*; *Dale v. St. L., K. C. & N. Ry. Co.*, *supra*; *Stoddard v. St. Louis, Kansas City & Northern Ry. Co.*, 65 Mo. 514; *Bridges v. St. Louis, Iron Mountain & Southern R. R. Co.*, 6 Mo. App. 389; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Kelley v. Silver Springs Co.*, 12 R. I. 112; *Lake Shore & Mich. Southern Ry. Co. v. Fitzpatrick*, 31 Ohio St. 479; *Mehan v. Syracuse, B. & N. Y. R. R. Co.*, 73 N. Y. 585; *Hawley v. Northern Cent. Ry. Co.*, 17 Hun, 115; *Colorado Cent. R. R. Co. v. Ogden*, 3 Col. 499; *Britton v. Great Western Cotton Co.*, Law Rep. 7 Exch. 130. Evidence is admissible that plaintiff notified the company, or its proper agents, of the defect, and was requested to continue in employment under a promise to repair the defect: *Harvey v. N. Y. Cent. & Hudson River R. R. Co.*, 19 Hun, 556; *Patterson v. Pittsburg & Connellsville R. R. Co.*, 76 Penn. St. 389; S. C. 9 Am. Ry. Rep. 381. And such action by the employe will not be a waiver of the defect: *Belair v. C. & N. W. R. R. Co.*, *supra*; or render him guilty, as matter of law, of contributory negligence; this is a question for the jury: *Hough v. Railroad Co.*, 100 U. S. 213, 21 Am. Ry. Rep. 451; *Kelley v. Silver Springs Co.*, 12 R. I. 112; *Col. Cent. R. R. Co. v. Ogden*, *supra*; *McGowan v. St. Louis & Iron Mountain*

R. R. Co., 61 Mo. 528; *Conroy v. Vulcan Iron Works*, 6 Mo. App. 102; S. C. 62 Mo. 35. But if the defects be not remedied within a reasonable time, the servant may not continue to expose himself to danger: *Crutchfield v. Richmond & Danville R. R. Co.*, 76 N. Car. 320; S. C. 78 N. Car. 300, 16 Am. Ry. Rep. 212; *Colorado Cent. R. R. Co. v. Ogden*, *supra*. But see *contra*, *Mansfield Coal & C. Co. v. McEnery*, 91 Penn. St. 185; S. C. 37 Leg. Int. 28. The burden of proof to establish the contributory negligence of the servant is on the company: *Hough v. Railroad Co.*, *supra*. If employes, whose duty it is to observe the condition of bridges, etc., have actual or implied notice of defects therein, or in the exercise of reasonable diligence might have had, the company is chargeable with negligence in not repairing: *Locke v. S. C. & P. Ry. Co.*, 46 Ia. 109, 16 Am. Ry. Rep. 138; *Brabbitts v. C. & N. W. Ry. Co.*, 38 Wis. 289. It is not proper, however, in order to prove the unsound condition of a bridge which has fallen, to produce in evidence a piece of timber from a part of the bridge which did not go down; but it may be admissible for other purposes: *Mann v. S. C. & P. Ry. Co.*, 46 Ia. 637, 16 Am. Ry. Rep. 146.

<sup>1</sup> *Chi. & N. W. R. R. Co. v. Ward*, 61 Ill. 130. And see *Flanagan v. Chicago & N. W. Ry. Co.*, 45 Wis. 98, 18 Am. Ry. Rep. 73.

In determining the question of negligence, the jury may be instructed that the plaintiff is not required to show, by direct testimony, just what deceased was doing at the instant of receiving his injury, and that the jury may take into consideration, in weighing the evidence, the hazardous nature of the employment, and give due weight to the instincts and presumptions which naturally lead men to avoid injury.<sup>1</sup>

There must be some evidence of negligence on the part of the company: either in providing improper materials, or in suffering materials or structures which have become defective to remain in use.<sup>2</sup> The burden of proof is on the employe, not only to clear himself of contributory negligence, but to show his ignorance of the defects which caused the injury.<sup>3</sup> If the defect be of such a character that it could not fail to be observed, the mere use will charge the employe with knowledge; but if it be a latent defect, it is otherwise.<sup>4</sup> In the latter case, both parties are excused.<sup>5</sup>

No custom, however uniform, will excuse the maintenance of structures unnecessarily dangerous to employes.<sup>6</sup>

Where it appears a conductor has instructions indicating the

<sup>1</sup> *Way v. Illinois Central R. R. Co.*, *supra*.

<sup>2</sup> *Ladd v. New Bedford R. R. Co.*, 119 Mass. 412, 9 Am. Ry. Rep. 273; *Hanrathy v. Northern Central Ry. Co.*, 46 Md. 280, 18 Am. Ry. Rep. 188; *Toledo, Peoria & Warsaw Ry. Co. v. Conroy*, 61 Ill. 162, 12 Am. Ry. Rep. 431; *Toledo, Wabash & Western Ry. Co. v. Black*, 88 Ill. 112, 21 Am. Ry. Rep. 290; *Indianapolis, Bloomington & Western Ry. Co. v. Toy*, 91 Ill. 474; *East St. Louis P. & P. Co. v. Hightower*, 92 Ill. 139.

<sup>3</sup> *Belair v. Chicago & N. W. R. R. Co.*, 43 Ia. 662, 14 Am. Ry. Rep. 575; *Price v. Henagan*, 5 Bradw. (Ill.), 234; *Campbell v. Atlanta & Richmond Air Line R. R. Co.*, 53 Ga. 488; *Atlanta & R. Ry. Co. v. Campbell*, 56 Ga. 586; *Henry v. Staten Island Ry. Co.*, 81 N. Y. 373; S. C. 10 N. Y. Weekly Dig. 430. But see, *contra*, *Balt. & Ohio R. R. Co. v. Whittington*, 30 Gratt.

805. And the same is true as to proof of notice of defects, or negligence in relation thereto: *East St. Louis P. & P. Co. v. Hightower*, 92 Ill. 139; *Mansfield Coal & C. Co. v. McEnery*, 91 Penn. St. 185; S. C. 37 Leg. Int. 28.

<sup>4</sup> *Belair v. C. & N. W. R. R. Co.*, *supra*; *Mich. Cent. R. R. Co. v. Smithson*, 45 Mich. 212; S. C. 1 Am. and Eng. R. R. Cas. 101. But see *Wedgwood v. Chicago & Northwestern Ry. Co.*, 44 Wis. 44, 19 Am. Ry. Rep. 393, which holds this rule as to the company, but refuses to apply it to an employe, in the absence of evidence that he was in charge of the car at the time.

<sup>5</sup> *Central R. R. & Banking Co. v. Kenney*, 58 Ga. 485, 16 Am. Ry. Rep. 131; *Porter v. Hannibal & St. Joseph R. R. Co.*, 71 Mo. 66; S. C. 9 Repr. 549.

<sup>6</sup> *Dorsey v. Phillips & Colby Const. Co.*, 42 Wis. 583, 15 Am. Ry. Rep. 143.

dangerous condition of a bridge, it will be for the jury to say whether the omission to stop before attempting to cross the bridge, amounts to negligence on his part.<sup>1</sup> And a switchman, engaged in coupling cars from the inside of a curve, who catches his foot in a guard known by him to exist, and is thus injured, is guilty of greater negligence than the company, and can not recover.<sup>2</sup>

Railroad companies are not bound to build the bridges across their tracks so high that an employe standing upon the top of a car will not be injured;<sup>3</sup> nor are they liable for injuries caused by its decaying away and falling, without proof of knowledge on their part, if constructed properly, and inspected with sufficient frequency and care.<sup>4</sup>

The use and employment of unsafe and defective cars or machinery, though owned by another company, subjects the using company to the same liability for injury occasioned thereby as though it were the owner.<sup>5</sup> And a railroad company voluntarily using the defective track of another, is liable for injuries to its passengers or employes resulting therefrom.<sup>6</sup> But if the use of

<sup>1</sup> *Locke v. S. C. & P. Ry. Co.*, 46 Ia. 109, 16 Am. Ry. Rep. 138.

<sup>2</sup> *Foster v. Chicago & Alton R. R. Co.*, 84 Ill. 164, 16 Am. Ry. Rep. 452; *Chicago & N. W. Ry. Co. v. Bliss*, 6 Bradw. (Ill.), 411. See, also, affirming the general doctrine of contributory negligence in such cases: *Gibson v. Erie Ry. Co.*, 63 N. Y. 449, 5 Hun, 31; *Toledo, Wabash & Western Ry. Co. v. Asbury*, 84 Ill. 429; *Chicago & Alton R. R. Co. v. Rush*, *Id.* 570; Ill. Cent. R. R. Co. v. *Modglin*, 85 Ill. 481; *Same v. Patterson*, 93 Ill. 290; *Penn. Co. v. Hankey*, *Id.* 580; *Lake Shore & Mich. Southern Ry. Co. v. Roy*, 5 Bradw. (Ill.), 82; *Price v. Henagan*, 5 Bradw. (Ill.), 234; *O'Neill v. Keokuk & D. M. R. R. Co.*, 45 Ia. 546; *Baird v. C., R. I. & P. R. R. Co.*, 55 Ia. 121; *S. C. 7 N. W. Repr.* 496; *Colorado Cent. R. R. Co. v. Ogden*, 3 Col. 499; *Balt. & Ohio R. R. Co. v. Whittington*, 30 Gratt. 805; *Memphis & Charleston R. R. Co. v. Thomas*, 51

*Miss.* 637; *Evans v. Atlantic & Pac. R. R. Co.*, 62 Mo. 49; *Atlantic & W. P. R. R. Co. v. Webb*, 61 Ga. 586.

<sup>3</sup> *Baylor v. Del., Lack. & Western R. R. Co.*, 40 N. J. Law, 23, 17 Am. Ry. Rep. 344; *Balt. & Ohio R. R. Co. v. Stricker*, 51 Md. 47; *Owen v. N. Y. Cent. R. R. Co.*, 1 Lans. 108; *Devitt v. Pacific R. R. Co.*, 50 Mo. 302; *Pittsburg & Connellsville R. R. Co. v. Sentmeyer*, 92 Penn. St. 276; *S. C.* 37 Leg. Int. 194.

<sup>4</sup> *Faulkner v. Erie Ry. Co.*, 49 Barb. 324; *Warner v. Same*, *Id.* 558; *Harrison v. Cent. R. R. Co.*, 2 Vroom, 293; *McDermott v. Pac. R. R. Co.*, 30 Mo. 115; *Brothers v. Cartter*, 52 Mo. 372; *Mansfield Coal & C. Co. v. McEnery*, 91 Penn. St. 185; *S. C.* 37 Leg. Int. 28.

<sup>5</sup> *St. Louis & Southeastern Ry. Co. v. Valirius*, 56 Ind. 511, 18 Am. Ry. Rep. 116.

<sup>6</sup> *Stetler v. Chicago & Northwestern Ry. Co.*, 49 Wis. 609; *S. C.* 6 N. W.

the track was only occasional, and for special purposes, and under special instructions to those in charge of trains as to the manner of running thereon, the liability depends upon whether it was negligence to use the track in that manner and for that purpose.<sup>1</sup> Where it is made the duty of railroad companies, by statute, to receive for transportation the cars of other companies, they can not be charged with negligence from the fact that the coupling apparatus of such cars differed from its own, and was more dangerous, nor by failure to notify brakemen of the difference.<sup>2</sup>

**10. Contract with, for exemption from liability for injury.**—In some of the states, it is held that railroad corporations may lawfully contract with employes for exemption from liability for personal injuries, except as against gross or criminal neglect of the company or its principal officers; and such is the doctrine in Georgia.<sup>3</sup> But a release of an employe's right of action against the company, obtained immediately after the injury, and while he was so under the influence of drugs and opiates as to mentally incapacitate him to contract, is voidable, and not a defense to the action;<sup>4</sup> and the employe need not repay, or offer to repay, the money obtained as a consideration for such release, before he can maintain his action; but the jury should credit the amount in their verdict.<sup>5</sup>

**11. His character of servant not changed to that of passenger by riding on the cars from work.**—Where, by the terms of his employment, a laborer is carried to or from his place of labor upon the gravel train of the company, he is to be regarded as still a servant of the company while passing to or from his place of labor upon such train, and as bound to render service thereon, when required so to do, during transit of the train, and therefore is all the time within the rule that exempts the employer from liability for injuries to one servant flowing from the negligence of his fellow servant.<sup>6</sup>

Repr. 303, 21 Am. Ry. Rep. 89; *Stetler v. Same*, 46 Wis. 497, 21 Am. Ry. Rep. 402.

<sup>1</sup> *Stetler v. C. & N. W. Ry. Co.*, 46 Wis. 497.

<sup>2</sup> *Mich. Cent. R. R. Co. v. Smithson*, 45 Mich. 212.

<sup>3</sup> *Western & Atlantic R. R. Co. v.*

*Bishop*, 50 Geo. 465.

<sup>4</sup> *Chicago, Rock Island & Pacific R. Co. v. Doyle*, 18 Kans. 58, 15 Am. Ry. Rep. 187. And see *Schultz v. Chicago & Northwestern Ry. Co.*, 44 Wis. 638, 18 Am. Ry. Rep. 146.

<sup>5</sup> *C., R. I. & P. R. R. Co. v. Doyle*.

<sup>6</sup> *Russell v. The Hudson River R. R.*



**12. Competency of, as witnesses.**—In an action against a railroad company for negligence, the engine driver or other servant of the company through whose negligence the injury is alleged to have occurred, is not, at common law, a competent witness for the defendant. If the defendant be convicted of negligence, and be mulcted in damages, by reason of his neglect or wrong act, he is liable over to the company for the amount; and if, on the other hand, the company be acquitted, it amounts to a finding in fact, though it might not be a bar to an action against him, that there was no negligence on his part. So, in either event, his interest is against the plaintiff, and his evidence is not permissible.<sup>1</sup>

**13. The burden of proof of unfitness is on the party alleging it.**—The burden of proof to show the unfitness of an employe, from whose conduct injury has resulted to another employe, is upon the plaintiff, in an action for damages occasioned by such injury;<sup>2</sup> the presumption is in favor of the company, that it used due care in selecting the servant.<sup>3</sup> But general reputation of unfitness may be sufficient to put the employer upon inquiry; and the retention of an employe under such circumstances may amount to negligence, if the proof be such as to bring the knowledge home to the employer, or to charge him therewith.<sup>4</sup> But if the knowledge of the injured employe is equal, in respect to the unfitness of the servant causing the injury, with that of the employer, and he continue in the service without complaint thereof, then their negligence is mutual, and there can be no recovery.

The rule, as laid down in Georgia, is that where the injured servant is engaged in the same employment causing the injury, the *onus* is upon him to show himself without fault. This being done, a presumption arises that his co-employes were negligent, and the *onus* is shifted upon the company to show them without negligence.<sup>5</sup>

Co., 17 N. Y. (3 Smith), 134. See, *contra*, O'Donnell v. Allegheny R. R. Co., 50 Penn. St. 490; Gillenwater v. Madison & Indianapolis R. R. Co., 5 Ind. 339.

<sup>1</sup> Galena & Chi. Union R. R. Co. v. Welch, 24 Ill. 31; Chi. & Rock Island R. R. Co. v. Hutchins, 34 Ill. 108; Catawissa R. R. Co. v. Armstrong, 49 Penn. St. 186. But such a witness would be competent for the plaintiff:

Cincinnati, Hamilton & Dayton R. R. Co. v. Spratt, 2 Duvall, 4.

<sup>2</sup> Summerhays v. Kansas Pacific Ry. Co., 2 Col. 484, 20 Am. Ry. Rep. 359.

<sup>3</sup> Summerhays v. K. P. Ry. Co.

<sup>4</sup> Chapman v. Erie Ry. Co., 55 N.Y. 579; S. C. 7 Am. Ry. Rep. 357.

<sup>5</sup> Central R. R. & Banking Co. v. Kelly, 58 Ga. 107, 16 Am. Ry. Rep. 114; Same v. Kenney, *Id.* 485, 16 Am. Ry. Rep. 131.

## CHAPTER LVI.

### COMMON CARRIERS OF THINGS.

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**1. Bound to carry, if paid.**—Railroad corporations engaged in the business of carrying goods and property for hire are common carriers.<sup>1</sup> As such, they exercise a public employment, and are bound in law to carry, so far as their facilities enable them,

<sup>1</sup>And so are express companies: 28 Ohio St. 144, 14 Am. Ry. Rep. 82. United States Exp. Co. v. Backman,

whatever is offered for carriage, and is proper to be carried, if paid therefor.<sup>1</sup> They are, moreover, bound to provide reasonable means of carriage, sufficient to meet the ordinary demands and necessities of the business; but are not bound to be ready to meet the demand of any unexpected and greatly increased requirements.<sup>2</sup> And so in regard to passengers; the same principles prevail. Such companies are not bound to have in readiness transportation for an unusual number of passengers, greatly beyond the number reasonably to be expected, and if they present themselves in such excessive numbers, and beyond the immediate means of transportation, the company is not required in law to receive them;<sup>3</sup> but if it does receive them, it is then under obligations to provide transportation for them as in ordinary cases, unless their reception be with notice of inability so to do, and on conditions relieving the company from the usual responsibilities in that respect.<sup>4</sup>

To excuse the carrier from his obligation to carry, upon the ground of an unusual influx or accumulation of business, beyond the immediate abilities of the company to meet, the refusal must be made before receiving the articles to be carried, and must be refused upon that ground. If the goods be received for carriage, it is then too late to look to the condition or state of the rolling stock, or means of carriage. If once actually received for carriage, it is the duty of the carrier to send them forward without delay.<sup>5</sup> In judging of the diligence of a railroad company as to preparations for discharging its obligations to the public as a common carrier, the amount of business ordinarily done by the road is the only proper measure of its obligation to furnish transportation.<sup>6</sup> If by reason of a sudden and unusual demand for stock or produce in the market, or from any other cause, there be an unexpected influx of business to the road, its obligation will be discharged by shipping such stock or prod-

<sup>1</sup> *Chicago & Alton R. R. Co. v. The People, ex rel. Koerner*, 67 Ill. 11.

<sup>2</sup> *Evansville & Crawfordsville R. R. Co. v. Duncan*, 38 Ind. 441.

<sup>3</sup> *Evansville & Crawfordsville R. R. Co. v. Duncan*, 28 Ind. 441.

<sup>4</sup> *Evansville & Crawfordsville R. R. Co. v. Duncan*, 28 Ind. 441.

<sup>5</sup> *Faulkner v. South Pacific R. R. Co.*, 51 Mo. 311; *Tucker v. Pacific R. R. Co.*, 50 Mo. 385.

<sup>6</sup> *Galena & Chi. Union R. R. Co. v. Rae and others*, 18 Ill. 488; *Wibert v. New York & Erie R. R. Co.*, 19 Barb. 36; *Ballentine v. North Mo. R. R. Co.*, 40 Mo. 491.

nce in the order and priority of time in which it is offered at the particular station, and with reasonable dispatch.<sup>1</sup>

As common carriers, railroad companies are not bound by law to accept goods for carriage, by the company to whom offered, to be carried beyond the terminus of its own road.<sup>2</sup> But the acceptance of goods marked to a place beyond such terminus may, in the absence of any usage to the contrary, or different understanding, amount, *prima facie*, to an undertaking to carry to and deliver at the point of destination so marked upon the goods.<sup>3</sup> If, however, the bill of lading, or receipt given for the goods, indicate a different or limited obligation, the shipper is bound thereby, in the absence of fraud or mistake.<sup>4</sup>

A railroad company is chargeable as a common carrier of a railroad car delivered to and received by it for carriage, if exclusively within the control of the carrier company, during transportation, and whilst held by it for carriage.<sup>5</sup> But it is not liable for property which is being carried, if lost by reason of the interference of the owner.<sup>6</sup>

An agreement by a railroad company to carry for a certain time at fixed rates, is a continuing agreement for such time; and the refusal of the company to carry according to the contract will render it liable to an action.<sup>7</sup>

Where it is the custom of a railroad company to carry back, free of charge, the empty grain sacks of shippers who send grain over its road, then the consideration paid for the shipment of the grain is, in law, such a consideration for the carriage of the sacks on return, under the custom, as will hold the company liable for the loss thereof, to the extent of a common carrier's liability for goods received to be carried for reward.<sup>8</sup> But no

<sup>1</sup> Galena & Chi. Union R. R. Co. v. Rae and others, 18 Ill. 488; Wibert v. New York & Erie R. R. Co., 19 Barb. 36; Ballentine v. North Mo. R. R. Co., 40 Mo. 491.

<sup>2</sup> Mulligan v. Ill. Cent. Ry. Co., 36 Iowa, 181.

<sup>3</sup> Mulligan v. Ill. Cent. Ry. Co., 36 Iowa, 181.

<sup>4</sup> Mulligan v. Ill. Cent. Ry. Co., 36 Iowa, 181.

<sup>5</sup> New Jersey R. R. & T. Co. v. The

Pennsylvania R. R. Co., 3 Dutch. 100.

<sup>6</sup> Roderick v. R. R. Co., 7 West Va. 54.

<sup>7</sup> Harvey v. Conn. & Passumpsic Rivers R. R. Co., 124 Mass. 421, 18 Am. Ry. Rep. 9.

<sup>8</sup> Pierce v. Mil. & St. Paul Ry. Co., 23 Wis. 387. The additional inducement thus held out to shippers is a consideration, valuable in itself, between the parties. It becomes, in fact, although a custom, part of the

outside terms as to return duties can be imposed by the shipper; therefore a railroad company will not be regarded in law as undertaking to add to its duties of common carrier of freights that also of collector of moneys due from the consignee as the purchaser of such freights, without an express agreement so to do; and the letters C. O. D. on the box containing the freights, and in connection with the name of the consignee, will not amount to evidence of such an agreement or undertaking.<sup>1</sup> In such case, an ordinary delivery of the goods to the consignee discharges the company,<sup>2</sup> if no other reason exist to the contrary.

**2. May not discriminate between shippers.**—Regarding railroad corporations in the light of common carriers at common law, they are bound to accommodate all persons alike, who resort to their lines for the purpose of transporting their effects. They may not say, I will carry for one, and not for another; or, I will carry at one price for one, and at a different price for another; or, in the language of the court, in *Chicago & Northwestern Railway Company v. The People, ex rel. of Hempstead*, I “will deliver goods at the warehouse of A and B, but will not deliver at the warehouse of C, the latter presenting equal facilities for the discharge of freight, and being accessible on respondent’s line.” They must receive and carry goods for all persons alike, without injurious discrimination as to terms.<sup>3</sup>

In New Hampshire, this common law rule not only prevails, but is substantially re-enacted by statute. The carriage must be for all alike, under like circumstances.<sup>4</sup>

And likewise in Delaware, a common carrier is one who carries persons or things for others generally, for hire and reward. He exercises a sort of public employment, and is bound

contract of affreightment, and is inseparable from the consideration to be paid by the shipper. An action would lie for refusal to carry the bags back free of further compensation; and if it would, there is a consideration at the bottom of it. An action will not lie on a mere naked promise.

<sup>1</sup> *Chi. & N. W. Ry. Co. v. Merrill*, 48 Ill. 425.

<sup>2</sup> *Chi. & N. W. Ry. Co. v. Merrill*, 48 Ill. 425.

<sup>3</sup> *Chi. & N. Western Ry. Co. v. The People, ex rel. Hempstead*, 56 Ill. 365; *Wheeler v. San Francisco & Alameda R. R. Co.*, 31 Cal. 46; *Bennett v. Dutton*, 10 N. Hamp. 481; *McDuffee v. Portland & Rochester R. R. Co.*, 52 N. H. 430; S. C. 2 Am. Ry. Rep. 261.

<sup>4</sup> *McDuffee v. Portland & Rochester R. R. Co.*, 52 N. Hamp. 430; S. C. 2 Am. Ry. Reps. 261; *Bennett v. Dutton*, 10 N. H. 481.

to serve all alike, and on like terms. He is an insurer of things carried, whilst a warehouseman is bound only to ordinary care.<sup>1</sup> His liability begins on receipt of the goods, as a carrier, of property properly packed, and terminates on delivery of the same to the consignee; or if he be not present on their arrival at the place of destination, they are to be there stored, and the liability as carrier ceases. If stored in the carrier's own warehouse, his liability is thenceforth that of a warehouseman only.<sup>2</sup> The cost of storage is chargeable to the owner, and is a lien, as are the costs of carriage, upon the goods.<sup>3</sup>

They exercise a public employment; such has been the ruling in England, as to common carriers, from an early day,<sup>4</sup> which rulings, as far as we know, have not been departed from in this country, but are respected and recognized as law in our courts.<sup>5</sup> It follows, as a necessary consequence, that they may not discriminate unjustly, but must deal fairly with the public.<sup>6</sup> Accepting a charter, and voluntarily organizing under a general incorporation law, as such common carriers, subjects them to the common law duties and responsibilities of such persons and bodies, whether natural or corporate; and though they have a right to fix their own charges, consistent with law, for transportation, yet it is only such right to fix the same as natural persons have in performing the functions of common carriers; as the latter may not unjustly discriminate, so may not railroad companies.<sup>7</sup>

Nor may they make unreasonable charges, though they be uniformly applied to all persons, without discrimination. They can not practice extortion on the public, any more than they can

<sup>1</sup> *McHenry v. Phila., Wilmington & Balt. R. R. Co.*, 4 Del. (4 Harrington), 448; *Culbreth v. Phila., Wilm. & Balt. R. R. Co.*, 3 Houston, 392.

<sup>2</sup> *McHenry v. Phila., Wilmington & Balt. R. R. Co.*, 4 Del. 448; *Culbreth v. Phila., Wilm. & Balt. R. R. Co.*, 3 Houst. 392.

<sup>3</sup> *McHenry v. The Phila., Wilm. & Balt. R. R. Co.*, 4 Del. 448; *Culbreth v. Phila., Wilm. & Balt. R. R. Co.*, 3 Houston, 392.

<sup>4</sup> *Coggs v. Bernard*, 2 Lord Raymond's Reps. 909.

<sup>5</sup> *Chi. & Alton R. R. Co. v. The People, ex rel. of Koerner et al.*, 67 Ill. 11.

<sup>6</sup> *Vincent v. The Chi. & Alton R. R. Co.*, 49 Ill. 33; *People v. Chi. & Alton R. R. Co.*, 55 Ill. 111; *Chi. & N. W. Ry. Co. v. The People, ex rel. Hempstead et al.*, 56 Ill. 365; *Chi. & Alton R. R. Co. v. The People, ex rel. of Koerner et al.*, 67 Ill. 11.

<sup>7</sup> *Chi. & Alton R. R. Co. v. The People, ex rel. Koerner et als.*, 67 Ill. 11, 17, 18.

refuse to serve them at all; for if the one be allowed, then it may be made so unreasonable or unendurable as to prevent the acceptance of service at all.<sup>1</sup> The mode of controlling these common law duties may be prescribed by enactment of law.<sup>2</sup>

By Article XI, Sec. 15, of the present constitution of Illinois, this common law inhibition of discrimination and extortion is expressly adopted, and it is further provided thereby that it may be enforced by penalties commensurate with the emergency, even to the extent of forfeiture of franchise.<sup>3</sup> But a law imposing this extreme penalty of forfeiture for the first offense is unconstitutional and void, as opposed to the spirit of the constitutional provision which declares that "all penalties shall be proportioned to the nature of the offense," as also to that clause prohibiting discrimination, which allows enforcement thereof only by "adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."<sup>4</sup> Again, the discrimination, to be illegal, must be unjust, and any statute inhibiting the same should afford an opportunity to the corporation, by a day in court, to defend, and to be heard as to the reason and fitness thereof.<sup>5</sup>

Although railroad corporations, as common carriers, can not be compelled, from the very nature of their manner of transportation, to ordinarily deliver goods carried by them at the places of business of consignees, yet the exception in this respect is by reason of the inability to carry off of their line of rails. But where that inability does not exist, or is not in the way of reaching the place of business of the consignee, then, inasmuch as the reason of the exemption ceases to exist, so the exemption itself ceases. Therefore railroad carriers are bound to receive and carry grain in bulk over their roads deliverable at, and are bound to deliver it at, the elevator of the consignee on the main line or side track of such companies, owned or used by them.<sup>6</sup> They

<sup>1</sup>Chi. & Alton R. R. Co. v. The People, *ex rel.* Koerner *et als.*, 67 Ill. 11, 22, 23.

<sup>2</sup>Chi. & Alton R. R. Co. v. The People, *supra*.

<sup>3</sup>Chi. & Alton R. R. Co. v. People, *supra*.

<sup>4</sup>Chi. & Alton R. R. Co. v. The People, *ex rel.* Koerner *et al.*, 67 Ill.

11, 26, 27.

<sup>5</sup>Chi. & Alton R. R. Co. v. The People, *ex rel.* Koerner *et al.*, 67 Ill. 11, 26, 27.

<sup>6</sup>Vincent and another v. Chi. & Alton R. R. Co., 49 Ill. 33; Chi. & N. W. Ry. Co. v. The People, *ex rel.* Hempstead, 56 Ill. 365.

are also bound to carry, in such cases, for all persons alike, and may not discriminate between persons in reference to such business.<sup>1</sup>

Any contract giving exclusive privileges to, or discriminating in favor of, certain owners of grain or of elevators, will be void, so far as regards the interests of persons requiring like services, and who are not parties to such contract.<sup>2</sup>

The duties of railroad companies and rights of shippers may be enforced in this respect by proceedings of mandamus against such companies;<sup>3</sup> also by injunction.<sup>4</sup>

Though railroad corporations, as common carriers, are ordinarily bound to accommodate all persons alike, and upon like terms—that is, all are entitled to be carried, and have freight carried, at the ordinary regular rate—yet they are not in law prohibited from carrying in particular instances, either as a matter of benevolence or favor, or as a means of procuring an advantage and profit to themselves in their business of carriers, for a less rate. They may not require some to pay more than their regular rates; but they may, in exceptional cases, carry for some for less.<sup>5</sup> The provision of the Louisiana code, that “every act

<sup>1</sup> Vincent and another *v.* Chi. & Alton R. R. Co., 49 Ill. 33; Chi. & N. W. Ry. Co. *v.* The People, *ex rel.* Hempstead, 56 Ill. 365; Cumberland Valley R. R. Co.’s Appeal, 62 Penn. St. 230; Camblos *v.* Phil. & Reading R. R. Co., 4 Brewst. 622; Messenger *v.* Penn. R. R. Co., 7 Vroom, 407.

<sup>2</sup> Chi. & N. W. Ry. Co. *v.* The People, *ex rel.* Hempstead, 56 Ill. 365; Sandford *v.* Catawissa, W. & E. R. R. Co., 24 Penn. St. 373; Audenried *v.* Phil. & Reading R. R. Co., 68 *Id.* 370; McDuffee *v.* Portland & Rochester R. R. Co., 52 N. H. 430; New England Exp. Co. *v.* Me. Cent. R. R. Co., 57 Me. 188.

<sup>3</sup> Chi. & N. W. Ry. Co. *v.* The People, *ex rel.* Hempstead, 56 Ill. 365.

<sup>4</sup> Vincent and another *v.* Chi. & Alton R. R. Co., 49 Ill. 33.

<sup>5</sup> Fitchburg R. R. Co. *v.* Gage, 12

Gray (Mass.), 393; Sargent *v.* Boston & Lowell R. R. Co., 115 Mass. 422; McDuffee *v.* P. & R. R. Co., *supra*; The Eclipse Towboat Co. *v.* The Pontchartrain R. R. Co., 24 La An. 1. The case last cited involved a discrimination made in consideration of a large loan of money, and for other reasons advantageous to the railroad company, and the Supreme Court of Louisiana, HOWE, J., say: “The case is narrowed, then, to the inquiry whether there was anything unlawful and legally injurious to plaintiffs in the agreement made by the Pontchartrain Railroad Company with Charles Morgan, by which, in the language of their trade, they “pro-rated” the through freight with him to and from New Orleans and Mobile, and declined to further pro-rate with plaintiffs. We can not perceive anything illicit in this agreement. The plaintiffs do



whatever of man that causes damage to another, obliges him by whose fault it happened to repair it," is, in the courts of said state, construed as controlled and characterized by the word *faute* therein, so as to require the act to be a faulty, or in some respects a wrong one, in order to incur the liability to make amends declared by the statute.<sup>1</sup> Hence, although from the act or another injury ensue to a person, no liability therefor attaches, under the said code, if the one committing the act be not in fault.<sup>2</sup>

It is held not to be a violation of the statute of Illinois, inhibiting discrimination in rates of transportation as between shippers, for a railroad company to agree to make a rebate to the shipper of a certain per cent. of the freights accruing on his shipments, the rate of transportation itself agreed on being the regular and legally authorized rate. Where the contract is to carry at the customary rates, the ruling in Illinois is, that a re-

not pretend that the railroad charged them, or the public generally, too much, but that it charged Morgan too little. What law did they violate in so doing? No statute of Louisiana has been infringed; none is quoted by appellants except the charter of the company, and that is silent on the subject": 24 La. Ann. 13. And in the case cited from 12 Gray, the Supreme Court of Massachusetts say, in treating of this subject: "The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compen-

sation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief."

<sup>1</sup> The *Eclipse Towboat Co. v. The Pontchartrain R. R. Co.*, 24 La. An. 1. In this case, the Supreme Court of Louisiana, HOWE, J., says: "There is no room for doubt at the present time as to the meaning of this language. It is copied literally from the Code Napoleon, and has been the subject of numerous decisions and abundant commentary. The phrase "every act" is controlled by the word "fault," and it results that the party bound must be in fault; that is to say, his conduct must be, in the general sense of the word, unlawful. No one can be held liable for the regular and prudent exercise of a legal right that belongs to him." p. 12.

<sup>2</sup> *Klein, for the use, etc., v. Crescent City R. R. Co.*, 23 La. An. 729; *Hubner v. New Orleans & Carrollton R. R. Co. et al.*, 23 La. An. 492.

bate in the charges, to be paid by the company to the shipper, is matter of private and legitimate arrangement between these parties, and is not illegal, but will be enforced.<sup>1</sup>

**3. May not discriminate between express companies.**—As common carriers, railroad companies owe the duty to the public of carrying for all alike. This duty extends not only, as has been seen, to ordinary consignors, but is alike applicable to express companies, whose business it is to carry goods and other valuables for hire. Therefore such railroad companies may not grant exclusive privileges, by contract or otherwise, of doing or carrying on the express business over their lines, to a particular express company or companies, person or persons, nor the exclusive privilege of chartering and running or using express cars thereon, but must, in that respect, extend equal facilities alike to all. To this duty they are as much bound as to the duty of carrying other freight, as ordinary carriers, alike for all.<sup>2</sup>

The Maine Central Railroad Company contracted with the Eastern Express Company, in 1865, to give to said express company a specified space in a car to be attached to the passenger trains of the railroad company, and to carry the agents and property of the express company, on specified terms, and agreed that they would not grant or let any similar space in any car or cars attached to the passenger trains, or run with them upon the road of said railroad company, to any other persons, as express carriers, during the continuance of said contract, which was to terminate in December, 1869. The New England Express Company applied to said railroad company for similar privileges and rights, and after giving reasonable notice of their intention so to do, offered, at Bangor, to said railroad company, packages and express matter and property, such as is usually carried by express companies, and required the same to be carried in such passenger trains, and were ready to pay or secure

<sup>1</sup> Toledo, W. & W. Ry. Co. v. Elliott *et al.*, 76 Ill. 67.

<sup>2</sup> Sandford v. R. R. Co., 24 Penn. St. R. 382; Chi. & N. Western Ry. Co. v. The People, *ex rel.* Hempstead, 56 Ill. 365; New England Express Co. v. The Maine Cent. R. R. Co., 57 Maine, 188; S. C. 2 Am. R. 31. In the first cited case the court say: "If it [the com-

pany] possessed this power, it might build up one set of men and destroy others, advance one kind of business and break down another; and might make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control." 24 Penn. St. 383.

the payment of a reasonable sum for such service, and offered to comply with all the usual and reasonable rules of transportation of express matter. The railroad company refused to receive and transport the same on their passenger train, in which other express matter was carried for said other express company at the same time. Thereupon, the New England Express Company, by reason of such refusal, brought an action on the case against the railroad company, to recover damages for such refusal, and the Supreme Court of Maine, APPLETON, C. J., in an able opinion, and after a most searching review of the subject, held that the action was maintainable, and ordered the case back to the *nisi prius* for assessment of damages.<sup>1</sup> In considering this case, the Supreme Court of Maine say: "Common carriers are bound to carry indifferently, within the usual range of their business, for a reasonable compensation, all freight offered, and all passengers who may apply. For similar equal services, they are entitled to the same compensation. All applying have an equal right to be transported, or to have their freight transported, in the order of their application. They can not legally give undue and unjust preferences, or make unequal and extravagant charges."<sup>2</sup>

Nor does it alter the case that the railroad company has rules, and has a right to make them, against the transportation of merchandise or property of any description in passenger trains. Such rules are well enough, if adhered to; but if set at naught for one person, or in one case, they may not be enforced against others. All must be treated alike in that respect.<sup>3</sup>

The carrier can not escape the common law duty and liability by fencing off a part of a car, or by setting apart a whole car, for one particular person or company, and excluding others from like privileges, and thus avoid the performance of such duties to the public as devolve upon and are required of common carriers. It is none the less a carriage of merchandise, though carried apart, in this manner, from itself. If done merely as a mutual

<sup>1</sup> New England Express Co. v. Maine Cent. R. R. Co., 57 Maine, 188; S. C. 2 Am. R. 31. See also, as in accord therewith, Bennett v. Dutton, 10 N. H. 481; Sandford v. R. R. Co., 24 Penn. St. 378; Texas Exp. Co. v. Tex-

as & Pac. Ry. Co., 6 Fed. Repr. 426; S. C. 1 Am. and Eng. R. R. Cas. 617, 618.

<sup>2</sup> 57 Me. 194.

<sup>3</sup> New England Express Co. v. Maine Cent. R. R. Co., 57 Maine, 188.

convenience (in a single instance), and not as a practice, and to avoid or evade the common duty due to all, and to give thereby a monopoly or unjust preference to one or more persons or companies over others, the law will tolerate it as a matter of temporary comity; but when resorted to as a shift or evasion, by which to elude the law and give advantages to particular persons, companies or shippers over others, it will not be tolerated.<sup>1</sup>

Such is the settled doctrine of the common law, irrespective of statutory regulations to the same effect; and if, after the organization of a carrier corporation as a railroad company, statutes are enacted imposing such equal performance of duties by the company, it is no infringement of charter rights, for the same duties exist at common law. Nor can such statutes be objected to in such cases as retroactive, if such they be, for being merely in affirmance of the common law duties already resting on the company, they neither affect the rights of the parties in one way or the other, unless it may be by the remedy or redress afforded thereby. Seeing, then, that the whole public are equally entitled to the advantages and conveniences arising from the duties of a common carrier, it follows, from the very nature of this right, that it must be extended to all alike, and that no special privileges can be granted to one or more persons or companies, and denied to others.<sup>2</sup>

The statute of Massachusetts, of 1867, requiring like and equal terms of transportation and service to all persons, does not have the effect of preventing railroad companies themselves from engaging in the business of expressmen, and at the same time refusing to carry express cars for others;<sup>3</sup> and by a parity of reasoning, neither does the common law. They may decline to haul express cars altogether, if they wish to, as not a duty imposed on them as common carriers. They are not required to extend to express companies other facilities or advantages than those which are furnished to individuals generally, or as pertain ordinarily to the duties of common carriers. They are not bound to carry for other carriers in separate cars to be controlled

<sup>1</sup> *New England Express Co. v. Sandford v. R. R. Co.*, 24 Penn. St. Maine Cent. R. R. Co., 57 Maine, 188. 378.

<sup>2</sup> *New England Express Co. v. Sargent v. Boston & Lowell R. R. Maine Cent. R. R. Co.*, 57 Maine, 188; Co., 115 Mass. 416.

by them. They are only required to carry on consignment, the goods to be controlled during transit and delivered by themselves.<sup>1</sup>

**4. Not bound to receive or carry dangerous property.**—A railroad company, or other common carrier, is not bound to receive for carriage, or bound to carry, articles of a dangerous or combustible character, and which endanger the safety of persons, freight or trains, or which will endanger consignees, or other persons receiving or handling the same.<sup>2</sup>

They are not only excused from receiving and carrying such articles, but are liable for injuries resulting therefrom to others necessarily handling or receiving the same, in ignorance of the dangerous quality thereof, if the company so carrying such article do so with knowledge of its dangerous character.<sup>3</sup> But if the company be ignorant of the dangerous character of the property, and there be nothing in the appearance thereof, or other circumstances in relation to it, calculated to cause suspicions to be entertained as to its dangerous character, then the company receiving and transporting it are not liable for an accident or injuries growing out of, or resulting from, its carriage, or of the reception and handling thereof by those to whom consigned, or by their servants, or the employes of the company, or others through whose hands it may pass in its transit, or into whose hands it may come at, or after arriving at, its place of destination.<sup>4</sup> Such, too, is the ruling in England.<sup>5</sup> Nor is the company bound to know, or chargeable with knowledge of, the dangerous character of such property carried by it, unless there be circumstances calculated to cause suspicions in the minds of persons of ordinary prudence, receiving the same for carriage; but where such suspicious circumstances or appearances exist, it is then the right, and indeed the duty, of the carrier to require information, amounting to a reasonable certainty, of the true character of the article offered for carriage.<sup>6</sup> And a failure to exact such information, where circumstances require it, will, it

<sup>1</sup> *Sargent v. Boston & Lowell R. R. Co.*, 115 Mass. 416.

<sup>2</sup> *Boston & Albany R. R. Co. v. Shanly*, 107 Mass. 576. See, to same purport, rulings in England: *Crouch v. London & N. W. R. W. Co.*, 14 Common Bench, 291.

<sup>3</sup> *Parrott v. Wells*, 15 Wall. 524;

*Boston & Albany R. R. Co. v. Shanly*, 107 Mass. 576.

<sup>4</sup> *Parrott v. Wells*, 15 Wall. 524; *Pierce v. Winsor*, 2 Clifford, 18.

<sup>5</sup> *Williams v. East India Co.*, 3 East, 192.

<sup>6</sup> *Parrott v. Wells*, 15 Wall. 524.

is believed, render the company liable for injuries, in like manner as if carried with knowledge thereof.<sup>1</sup>

In all such cases, however, of injuries arising from the dangerous character of goods transported, or delivered for transportation, which are of a dangerous character, rendering them dangerous in their carriage or handling, it is the duty of the consignor or shipper to give notice of their dangerous character to the company, or its agents or servants receiving the same, at the time the same is offered for shipment; and in default of giving such notice, the shipper becomes responsible for injuries resulting from the dangerous character of the property to persons ignorant thereof, whether such persons be employes, or the company, or warehousemen, or consignees of the goods, or servants of such consignees.<sup>2</sup> Such, likewise, is the English rule.<sup>3</sup>

5. **Not bound to deliver goods elsewhere than at their own depot.**—Railroad companies are not bound to deliver freights beyond the *terminus* of their line, nor off of the line of their road, nor on the line of the road except at their regular depots or warehouses; and are therefore not bound to receive freights to be thus delivered. They are not bound, as are ordinary carriers by land, to deliver the goods to the consignee at his ordinary place of business, or at his home. The rule of law in that respect is so far relaxed in regard to railways, as a matter of necessity, as in most cases to substitute in place of a common law delivery, a delivery at the warehouse or depot of the company provided for the storage of goods; and they may there hold them as warehousemen, discharged of their more strict liability as carriers, until they are applied for by the consignee.<sup>4</sup>

Yet it is a settled rule of the law that express companies are

<sup>1</sup> Parrott v. Wells, 15 Wall. 524.

<sup>2</sup> Boston & Albany R. R. Co. v. Shanly, 107 Mass. 568; Jeffrey v. Bigelow, 13 Wend. 518.

<sup>3</sup> Brass v. Maitland, 6 Ellis & B. 470; Farrant v. Barnes, 11 Common Bench (N. S.), 553.

<sup>4</sup> Vincent and others v. The Chi. & Alton R. R. Co., 49 Ill. 33; The People, *ex rel.* of Hempstead, v. The Chi. & Alton R. R. Co., 55 Ill. 95; S. C. 8 Am. R. 631, 634; McMasters v.

Pennsylvania R. R. Co., 69 Penn. St. 374; Morris & Essex R. R. Co. v. Ayres and others, 5 Dutch. 393; Witbeck v. Holland, 45 N. Y. 13; S. C. 6 Am. R. 23. In the case of McMasters v. Penn. R. R. Co., *supra*, a delivery or deposit of the goods on the platform of the station was holden to be a good delivery, that being the custom as to delivery at that particular station, although the consignee was not there to receive them.

not within such exemption, although they may transport by rail the property confided to them for carriage.<sup>1</sup> It is the duty of such express company to use due diligence to find the consignee—that is, such diligence as a prudent man would use in his own affairs—and when found, to deliver the property to him.<sup>2</sup> Any mistake in identity, as delivering to the wrong person, if the article be properly directed, will render the company liable to the rightful owner; and an oversight or mistake in the name of the consignee, or fraud practiced upon the carrier, not participated in by the consignee, will not excuse the party from such liability.<sup>3</sup>

The carrier will be entitled, however, to reasonable proof of the identity of the person claiming to be the consignee, before declining to deliver to such person will operate as a conversion of the goods.<sup>4</sup>

In the transportation of coal, lumber and other ponderous articles, deliverable to the consignee in the cars, the delivery is completed, and the liability of the company is discharged, when, if such is the custom between the parties, the car or cars are placed on the track at the point where these articles are usually unloaded, and the owner or consignee is notified thereof; this is the general rule, in the absence of any special contract.<sup>5</sup> If the property be destroyed by fire, after such deposit and notice, the loss falls on the owner, and not on the company, if the company be otherwise faultless in regard to it.<sup>6</sup>

By the Revised Statutes of Illinois of 1874, Chap. 114, Sec. 82, railroad companies are required, under penalty, to deliver grain shipped in bulk to any consignee to whom it is directed, where such consignee is accessible by any track owned, leased or used, or which can be used, by the company. It is held, under this statute, that it is essential that the grain be shipped in bulk, and that it must be directed to the place of delivery at the time of shipment.<sup>7</sup> This statute, however, imposes no obli-

<sup>1</sup> *Witbeck v. Holland*, 45 N. Y. 13.

<sup>2</sup> *Witbeck v. Holland*, 45 N. Y. 13; S. C. 6 Am. R. 23.

<sup>3</sup> *Witbeck v. Holland*, 45 N. Y. 13; *McEntee v. New Jersey Steam Boat Co.*, 45 N. Y. 34; S. C. 6 Am. R. 23.

<sup>4</sup> *McEntee v. New Jersey Steam Boat Co.*, 45 N. Y. 34.

<sup>5</sup> *Pittsburgh, Cin. & St. Louis Ry. Co. v. Nash and others*, 43 Ind. 423.

<sup>6</sup> *Pittsburgh, Cin. & St. Louis Ry. Co. v. Nash and others*, 43 Ind. 423.

<sup>7</sup> *Chicago & North Western Ry. Co. v. Stanbro*, 87 Ill. 195, 18 Am. Ry. Rep. 180.

gation upon railroad companies to run their trains upon tracks unfit for use, or to transport other merchandise than grain; so that the statute affords no justification for an injury inflicted under such circumstances.<sup>1</sup>

**6. May contract to, and be bound to, carry beyond the terminus of their own road.**—By the current of authorities, a railroad company may contract for the carriage of freights beyond the terminus of its own road, and such contract will bind it as carrier for the whole distance contracted for, and will render the contracting company liable for default in its performance, whether such default occur upon its own line, or upon connecting lines of another road.<sup>2</sup> In such case, if the contract be a special one, embodying conditions as to the liability, or as to the manner of transportation, the connecting line or lines will be entitled to the exemptions, and will be bound by the obligations, of such special provision; but to claim the exemptions or privileges, the obligation as to the manner of transportation must be complied with.<sup>3</sup>

And for the purpose of such further transportation, railroads

<sup>1</sup> *Stetler v. C. & N. W. Ry. Co.*, 49 Wis. 609; *S. C. 6 N. W. Repr.* 303, 21 Am. Ry. Rep. 89.

<sup>2</sup> *Weed v. Saratoga & Schen. R. R. Co.*, 19 Wend. 534; *Burtis v. Buffalo & State Line R. R. Co.*, 24 N. Y. 269; *Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514; *S. C. 6 Am. R.* 124; *Noyes v. Rutland & Burlington R. R. Co.*, 27 Vt. 110; *Morse v. Brainerd et al.*, Trustees Vermont Cent. and Vermont, & Canada R. R. Co., 41 Vt. 550; *Newell v. Smith*, 49 Vt. 255; 17 Am. Ry. Rep. 100; *Darling v. The Boston & Worcester R. R. Co.*, 11 Allen, 295; *Burroughs v. Norwich & Worcester R. R. Co.*, 100 Mass. 26; *S. C. 1 Am. R.* 78; *The Hill Mfnaf. Co. v. Boston & Lowell R. R. Co.*, 104 Mass. 122; *S. C. 6 Am. R.* 202; *Ill. Cent. R. R. Co. v. Frankenberg*, 54 Ill. 88; *S. C. 5 Am. R.* 92; *Wheeler v. San Francisco & Alameda R. R. Co.*, 31 Cal. 46; *Perkins v. Portland, Saco & Portsmouth*

*R. R. Co.*, 47 Maine, 573; *St. Louis, Kansas City & Northern Ry. Co. v. Piper*, 13 Kans. 505, 8 Am. Ry. Rep. 204; *Evansville & Crawfordsville R. R. Co. v. Androscoggin Mills*, 22 Wall. 594, 11 Am. Ry. Rep. 113; *Ohio & Miss. Ry. Co. v. McCarthy*, 96 U. S. 258; *Bryan v. Memphis & Paducah R. R. Co.*, 11 Bush, 597, 14 Am. Ry. Rep. 395; *Phillips v. N. Car. R. R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206; *Grover & Baker S. M. Co. v. Mo. Pac. Ry. Co.*, 70 Mo. 672. And may so bind themselves by implication: *Morse v. Brainerd, supra*. As to what is sufficient evidence of such a contract, see above cited case of *Phillips v. N. Car. R. R. Co.*

<sup>3</sup> *Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 380; *Dunseth v. Wade*, 2 Scam. 285; *Hastings v. Pepper*, 11 Pick. 41; *Peet v. Chicago & N. Western Ry. Co.*, 19 Wis. 118.



have, it is holden in some states, the right to own and operate steamboats upon waters in the line of their routes, or of the routes on which they thus extend their carriage. Therefore, if they hold themselves out to the public as common carriers to points beyond the *termini* of their roads, or on or across waters in the route thereof, or connecting therewith, they are bound to carry all persons, and also to carry freights for all persons alike, who apply to be served in that respect, and may not discriminate between them.<sup>1</sup>

Where such contract for through transportation calls for it to be done by all rail, connecting lines of road must conform to the terms thereof, to enable them to claim the benefits of any exemption from liability embodied in the contract; and a violation thereof—as, for instance, in assuming to carry the goods by water, notwithstanding the contract for all rail transportation—renders the connecting line so assuming to depart from the contract, as well as the company originally contracting, liable as insurers, or as ordinary carriers, without exemption, for losses occurring whilst the property is so being carried otherwise than by all rail, notwithstanding a clause in such contract which would exempt the company if the contract was strictly complied with.<sup>2</sup>

In cases of contracting to carry beyond the contracting company's own line, such company may exempt itself from liability for injuries or losses occurring on other lines than its own, as the terms on which the goods are received for transportation, if such exemption be fully understood and agreed to, or be acquiesced in, by the owner or consignor of the goods.<sup>3</sup> It is a question for the jury to determine, whether the consignor understood the

<sup>1</sup> *Wheeler v. San Francisco & Alameda R. R. Co.*, 31 Cal. 46. See *Ills. Cent. R. R. Co. v. Irvin*, 72 Ill. 452.

<sup>2</sup> *Maghee v. The Camden & Amboy R. R. Co.*, 45 N. Y. 514; *Johnson v. New York Cent. R. R. Co.*, 33 N. Y. 610. Such contract, however, for all rail transportation, does not preclude the use of ordinary means of ferriage, where the same is necessary. The reasonable intendment is, that the parties contracted with the knowledge of, and with a view to, such necessity: *Id.*

<sup>3</sup> *Ill. Cent. R. R. Co. v. Morrison*, 19 Ill. 136; *Ill. Cent. R. R. Co. v. Frankenberg*, 54 Ill. 88; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457; *Evansville & Crawfordsville R. R. Co. v. Androscoggin Mills*, 22 Wall. 594, 11 Am. Ry. Rep. 113; *Louisville & Nashville R. R. Co. v. Campbell*, 7 Heisk. 253, 12 Am. Ry. Rep. 490; *Taylor v. Little Rock, Miss. River & Tex. R. R. Co.*, 32 Ark. 393, 17 Am. Ry. Rep. 251.

terms of such contract; and if understood and acquiesced in, it will be binding.<sup>1</sup>

The better doctrine is, although there is a diversity of ruling on the subject, that a railroad company, or other common carrier, is not bound to receive property to be carried by the party so receiving it beyond the terminus of its own line. In the language of the learned Chief Justice BREESE: "This is a question not settled by the courts of this country, though the received doctrine may be said to be, that the carrier is not responsible beyond his own route, except upon his special undertaking so to be liable."<sup>2</sup>

There are respectable decisions to the effect that the receiving of the goods for transportation by a railroad company, marked for a point beyond the terminus of its own line, will, in the absence of any contract, conditions or limitations to the contrary, render the receiving company liable as upon an undertaking to transport the goods to the point so designated, and therefore liable for faithful performance, and for all losses, as well on connecting lines as upon its own; "that by accepting the goods so marked," the carrier "is bound to carry to and deliver at that place."<sup>3</sup> This rule, if authority at all, applies only to the first carrier or line, and not to connecting ones.<sup>4</sup> But the American and better rule seems to be, that notwithstanding the goods be directed or marked to a place beyond the terminus of the line receiving them for transportation, yet in the absence of a special agreement to carry, or cause them to be carried, to their destination, and the company not being one of a continuous line, then the company so receiving them is not liable for their carriage or safety, and is not bound thereto, beyond the terminus of its own line.<sup>5</sup>

<sup>1</sup> Ill. Cent. R. R. Co. v. Frankenberg, 54 Ill. 88; Adams Express Co. v. Haynes, 42 Ill. 89.

<sup>2</sup> Ill. Cent. R. R. Co. v. Frankenberg, 54 Ill. 88, 96; S. C. 5 Am. R. 92; Erie Ry. Co. v. Wilcox, 84 Ill. 239, 16 Am. Ry. Rep. 457; Lawrence v. The Winona & St. Peter R. R. Co., 15 Minn. 390; S. C. 2 Am. R. 130.

<sup>3</sup> Ill. Cent. Railroad Co. v. Frankenberg, 54 Ill. 88; S. C. 5 Am. R. 92; Erie Ry. Co. v. Wilcox, *supra*; Angle v. Miss. & Mo. R. R. Co., 9 Iowa,

487; East Tenn. & Va. R. R. Co. v. Rogers, 6 Heisk. 143, 12 Am. Ry. Rep. 47; Louisville & Nashville R. R. Co. v. Campbell, 7 Heisk. 253, 12 Am. Ry. Rep. 490.

<sup>4</sup> Lawrence v. The Winona & St. Peter R. R. Co., 15 Minn. 390; S. C. 2 Am. R. 130; Chouteaux v. Leech, 18 Penn. St. 224; Ill. Cent. R. R. Co. v. Johnson, 34 Ill. 389.

<sup>5</sup> Story on Bailments, ed. of 1836, sec. 538; Thomas v. The Boston & Prov. R. R. Co., 10 Met. 472; Law-

Yet the carriers, as we have seen, may by contract become bound to carry to a place beyond the end of their line. It does not follow that such contract must be an express one; it may be made or proven as other contracts may; and therefore such obligation, it has been held, may arise by implication and from circumstances, just as other facts may be proven by circumstances.<sup>1</sup> Thus if it is the custom of a carrier to so engage in through carriage to a point or points beyond the terminus of such carrier's route, and he receive goods marked to a point beyond that to which he is accustomed to carry, these will be fit circumstances in evidence toward establishing liability to see the goods through.<sup>2</sup>

The implied contract for carriage of goods received by a transportation company, to a point beyond the limits of the state wherein received, is as under the laws of the state where the contract is made and goods received. In any difficulty growing out of the terms of the undertaking, involving the legal rights of the parties, the local law of the contract prevails; that is, the law of the state where the goods are shipped from governs the rights of the parties, if nothing is agreed to, or plainly inferable to, the contrary.<sup>3</sup>

But although they may themselves contract to carry goods beyond the terminus of their own lines, as a general principle,<sup>4</sup> yet they can not bind other lines beyond theirs in that respect, without such other's consent.<sup>5</sup> Nor is there any obligation rest-

rence *v. The Winona & St. Peter R. R. Co.*, 15 Minn. 390; *S. C. 2 Am. R.* 130, 138; *Carter v. Peck*, 4 Sneed, 203; *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457; *McMillan v. The Mich. South. & N. Ind. R. R. Co.*, 16 Mich. 119; *Brintnall v. Saratoga & Whitehall R. R. Co.*, 32 Vt. 665; *Perkins v. Portland, Saco & P. R. R. Co.*, 47 Maine, 573; *Cin., Hamilton & Dayton R. R. Co. v. Pontius*, 19 Ohio St. 221; *S. C. 2 Am. R.* 391; *Camden & Amboy R. R. Co. v. Forsyth Bros. & Co.*, 61 Penn. St. 81; *Phillips v. N. Car. R. R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206. And the charge of freight indicated in the bill of lading may be referred to, as indicating the nature of the un-

dertaking, where the same comes in question, and is involved in ambiguity: *Camden & Amboy R. R. Co. v. Forsyth, supra.*

<sup>1</sup> *Morse v. Brainerd*, 41 Vt. 550; *Najac v. The Boston & Lowell R. R. Co.*, 7 Allen, 329; *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 256.

<sup>2</sup> *Vansantvoord v. St. John*, 6 Hill, 158; *Wibert v. N. Y. & Erie R. R. Co.*, 12 N. Y. 256.

<sup>3</sup> *Pennsylvania Co. v. Fairchild et al.*, 69 Ill. 260.

<sup>4</sup> *Rome R. R. Co. v. Sullivan, Cabot & Co.*, 25 Geo. 228.

<sup>5</sup> *Rome R. R. Co. v. Sullivan, Cabot & Co.*, 25 Geo. 228.

ing on either or any to undertake the carriage beyond their own terminus, except as they may contract so to do.<sup>1</sup>

In some of the states, however, the rule is firmly established that an actual agreement, that is, an express contract, is necessary to impose upon a railroad company the duty or obligation of carrying beyond the terminus of its own line. The very nature of its structure seems to us to preclude the presumption of an intention or undertaking to extend these services further than such terminus; and this, too, upon the same principle which exonerates such company from delivery, as in case of ordinary land carriage, at the home or place of business of the consignee.<sup>2</sup>

They may obviate all doubt, however, as to their liability to carry beyond their own line, or for loss or injury occurring beyond their own line, when operating as a distinct company, without particular business connection with connecting lines, by limitations and by express conditions in their receipts, bills of lading, or other contracts for transportation; as that the property is only received to be carried to the terminus of their route or line, and there delivered over to such connecting line or carrier as it may be consigned to, or as may be agreed upon by the consignor and the company receiving the same, and without liability of the receiving company beyond such terminus.<sup>3</sup> Such, too, is undoubtedly the more prudent course, and is calculated to avoid all difficulty or misunderstanding upon that subject.

**7. Their liability at common law.**—The common law liability of railroad companies transporting goods as common carriers, when the goods themselves are not destroyed by reason of

<sup>1</sup> *Rome R. R. Co. v. Sullivan, Cabot & Co.*, 25 Geo. 228.

<sup>2</sup> *Darling v. Boston & Worcester R. R. Co.*, 11 Allen, 295; *Burroughs v. Norwich & Worcester R. R. Co.*, 100 Mass. 26; S. C. 1 Am. R. 78; *Hood v. N. York & New Haven R. R. Co.*, 22 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457; *Converse v. The Norwich & N. Y. Transportation Co.*, 23 Conn. 166. The Connecticut cases go further, and hold, as a ground for such ruling, that a railroad company,

incorporated under the laws of that state, has no power to contract to carry beyond their own line: *Hood v. N. York & N. Haven R. R. Co.*, 22 Conn. 1; *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457; *Naugatuck R. R. Co. v. Waterbury Button Co.*, 24 Conn. 468; *Converse v. Norwich & N. Y. Transp. Co.*, 33 Conn. 166.

<sup>3</sup> *Cin., Hamilton & Dayton, and Dayton & Michigan R. R. Co. v. Pontius*, 19 Ohio St. 221; S. C. 2 Am. R. 391.

their perishable character or their own elements of destruction,<sup>1</sup> is that of insurers against all injury and loss, except that resulting from the act of God or of the public enemy.<sup>2</sup> And if a loss occurs, the burden of proof is on the company to show that it occurred from some one of those causes which avoid their liability, if such a defense is relied on.<sup>3</sup>

If by reason of military interferences, or obstructions from the public enemy, the carriage of the goods is hindered, delayed or rendered impossible, and yet the goods neither taken possession of nor destroyed by such enemy, it then becomes the duty of the carrier to care for and store the same, and if he does not make diligent effort to do so, and the goods are lost, he is liable; for in such case, the interference of the enemy or superior force is not the proximate cause of the loss, but such proximate cause is the subsequent neglect of the carrier. The military interference of the enemy is the proximate cause merely of the delay; and it does not follow that the loss of the goods must result directly therefrom.<sup>4</sup>

What is meant by the expression "act of God," as used in reference to the exemption of common carriers from liability for goods lost or destroyed in course of transportation, is the *vis*

<sup>1</sup> Angell on Law of Carriers, Sec. 210, 211; Hannibal & St. Jos. R. R. Co. v. Swift, 12 Wall. 262, 270, 273; Phila., Wilm. & Balt. R. R. Co. v. Harper, 29 Md. 330.

<sup>2</sup> Angle v. Mississippi & Missouri R. Co., 18 Iowa, 555; Michaels & Sloman v. N. York Cent. R. R. Co., 30 N. Y. (3 Tiffany), 564; Hale v. N. Jersey Steam Nav. Co., 15 Conn. 539; Fillebrown v. Grand Trunk R. W. Co., 55 Maine, 462; Clark v. Pacific R. R. Co., 39 Mo. 184; Watson v. Memphis & Charleston R. R. Co., 9 Heisk. 255, 19 Am. Ry. Rep. 256.

<sup>3</sup> Memphis & Charleston R. R. Co. v. Reeves, 10 Wall. 176; Angle v. Mississippi & Missouri R. R. Co., 18 Iowa, 555; Clark v. Pacific R. R. Co., 39 Mo. 184; Michaels & Sloman v. The N. York Cent. R. R. Co., 30 N. Y. (3 Tiffany), 564; Central R. R. & Bank-

ing Co. v. Anderson, 58 Ga. 393, 16 Am. Ry. Rep. 85; United States Express Co. v. Backman, 28 Ohio St. 144, 14 Am. Ry. Rep. 82; Erie Ry. Co. v. Lockwood; *Id.* 358, 14 Am. Ry. Rep. 143.

<sup>4</sup> Clark v. Pacif. R. R. Co., 39 Mo. 184; Balt. & Ohio R. R. Co. v. Morehead, 5 West Va. 293. A railroad company will not be liable, as for a conversion, by opening a sealed car and transferring its contents to another, if they are afterward delivered without loss or injury: Tucker v. Housatonic R. R. Co., 39 Conn. 447, 5 Am. Ry. Rep. 245. Nor by the inadvertent misstatement of an employe, that the goods had not arrived: Louisville & Nashville R. R. Co. v. Campbell, 7 Heisk. 253, 12 Am. Ry. Rep. 490.

*major* of nature, as winds, storms, lightnings, floods and earthquakes—the inevitable result of causes beyond the power of human control. For losses occasioned by either of these, the carrier is not responsible;<sup>1</sup> and this, too, although he be guilty of some negligence remotely contributory thereto.<sup>2</sup> So when the carrier has brought his case within the exemption, he is not bound to show affirmatively that he was free from negligence.<sup>3</sup>

The Supreme Court of the United States, MILLER, Justice, in the case of *Railroad Company v. Reeves*, *supra*, say: “A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused. What is to make him liable after this? No question of his negligence arises unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it.” The court then add, that “If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it.”<sup>4</sup>

There is a contrary ruling, however, in regard to the burden of proof in respect to negligence of the carrier, in New York, in which it is held that the carrier must, in addition to the loss by act of God or the public enemy, show affirmatively that his own negligence did not in any manner contribute to bringing about the injury. And, in the same case, where goods were unnecessarily detained by the carrier in transit, and during detention were destroyed or injured by flood, when the duty of the carrier was to forward them on to their destination, it is held

<sup>1</sup> *McArthur v. Sears*, 21 Wend. 190; *Elliott v. Rozell*, 10 John. R. 1; *Morrison v. Davis*, 20 Penn. St. 171; *Memphis & Charleston R. R. Co. v. Reeves*, 10 Wall. 176, 189.

<sup>2</sup> *Railroad Company v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Penn. St. 171; *Clark v. Pacific R. R. Co.*, 39 Mo. 184; *Lamont & Co. v.*

*Nashville & Chattanooga R. R. Co.*, 9 Heisk. 58, 19 Am. Ry. Rep. 284.

<sup>3</sup> *Railroad Company v. Reeves*, 10 Wall. 176.

<sup>4</sup> *Railroad Co. v. Reeves*, 10 Wall. 189, 190. And see *Nashville & Chattanooga R. R. Co. v. David*, 6 Heisk. 261, 12 Am. Ry. Rep. 9; *Same v. King*, *Id.* 269, *Id.* 52.

that by this wrongful detention of the goods the carrier lost his exemption, and was held liable.<sup>1</sup>

In *Clark v. Pacific R. R. Co.*, *supra*, the goods were in course of transit, and reached the city of Jefferson, on the way to St. Louis, and were there detached with a portion of the train, and left over until next day, when the public enemy burned that portion of the train with the goods. The part of the train that proceeded on to St. Louis reached there in ordinary time, and in safety. In an action to recover the value of the goods thus destroyed, the plaintiff claimed to hold the company liable as for negligence in transportation which contributed to bring about the injury, by leaving the portion of the train behind, whereby it fell into the hands of the public enemy. The court held the alleged negligence to be too remote, and said: "As to the delay, it was at most an injury without a damage, and as to the loss, it was a damage without an injury on the part of the defendant." And the company were exonerated from liability for the loss.<sup>2</sup>

If a railroad company whose road is in the hands of the United States military authority, accept freight to be transported over its road, and give a receipt for the same, without conditions, it will be liable to all the responsibilities of common carrier, and will be compelled to perform, or pay such damages as result from non-performance of, its contract of shipment; and this, too, notwithstanding a military order at the time prohibiting such shipments, and notwithstanding the superior control of the road by the government, if the acceptance be with a knowledge thereof.<sup>3</sup> But if the freight be merely delivered to the company for carriage, and be stored by it for the reason that the superior force of the government, exercised through the military power, renders its shipment impossible at the time of delivery, and that state of things exists when the freight is delivered to the company, then the owner is chargeable, as well as the railroad company, with knowledge thereof, and the freight being so left with the company during the restraint of the *vis major*, the company are not liable for loss by natural decay of the property.<sup>4</sup> The

<sup>1</sup> *Michaels & Sloman v. New York Cent. R. R. Co.*, 30 N. Y. (3 Tiffany), 564. And see *Read v. Spaulding*, *Ib.* 630.

<sup>3</sup> *Ill. Cent. R. R. Co. v. Ashmead*, 58 Ill. 487.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Ashmead*, 58 Ill. 487.

<sup>2</sup> 39 Mo. 184, 190, 191.

result would be the same if the goods were delivered when the road was free from restraint, and was under full control of the company, if, before the goods could be despatched and shipped with reasonable diligence, the road should be seized by the military force of the government, and military inhibition be placed upon the shipment of the goods. The company would not be liable for the result of the superior force of the sovereign power.

So if the property be taken from the possession of the railroad company, without its fault, by force of legal process, the better ruling seems to be that the company, as common carriers, are thereby absolved from liability therefor, provided it notifies the consignor thereof.<sup>1</sup>

The company have a right to know, in all cases, the true contents of parcels or packages or other thing consigned for shipment; and if valuables other than those made known be shipped therein, and be lost, the company are not liable therefor.<sup>2</sup> So if the goods be not properly packed and marked, the company are not liable for a loss occasioned thereby.<sup>3</sup>

The defense, in an action against a railroad company for loss of goods delivered for carriage, that the war of rebellion was raging at the time; that defendant's railway was under the dominion of the insurgent authorities; that these authorities monopolized the transportation, so that it was impossible to perform the contract for carriage until the capture of the city, where were the goods, by the government forces; that at the time of the last occurrence the goods were destroyed or carried off by a mob; and that the plaintiff had consigned the goods with knowledge that the railway was at the time under military control, and took all the risk of such a state of affairs, might, say the Supreme Court of Louisiana, be a valid defense if fully established; but that the *onus* is on the defendant to make it out.<sup>4</sup>

The rule laid down most recently in Wisconsin, and which

<sup>1</sup> *Bliven & Mead v. The Hudson River R. R. Co.*, 36 N. Y. (9 Tiffany), 403, 407; *Van Winkle v. U. S. Mail Steamship Co.*, 37 Barb. 122.

<sup>2</sup> *Chi. & Alton R. R. Co. v. Shea*, 66 Ill. 471.

<sup>3</sup> *Chi. & Alton R. R. Co. v. Shea*, 66 Ill. 471.

<sup>4</sup> *Flash, Hartwell & Co. v. New Orleans, Jackson & Great Northern R. Co.*, 23 La. An. 353.



prevails as the law of that state, is, that goods in the course of transit over several connecting lines of railroad continue to be in a state of transit or carriage until they reach their final destination, as well in the hands or warehouse of either company at the connecting places of the different roads, awaiting further transportation, or delivery over for transportation, as while actually moving onward in the cars; and that the liability of common carrier, and not that of warehouseman, attaches in all such cases, as against the company or line in whose possession they are for the time being.<sup>1</sup> By this decision, it is said that if the loss at an intermediate terminus along the route, occurs by reason of the fault of the next connecting line in neglecting to receive or remove the goods, after notice of their arrival, and of readiness to deliver the same over, then the company in whose hands the loss occurs, and who is compelled to pay for the same, has its right of action over against such connecting line, for the amount which it is thus rendered liable to pay by reason of the omission or fault of such connecting line of road.<sup>2</sup> If, however, the goods be detained anywhere, upon any or either of such lines, by reason of storm, flood, earthquake or war, so as to render it impossible to complete their transportation, or so as to create considerable or indefinite delay therein, then the company in whose hands they are may store them, and notify the consignee or owner of the condition of things, and thus convert its liability as carrier into that of a mere warehouseman, whilst they are necessarily thus stored, if the same be not removed by the owner or consignee.<sup>3</sup>

But in a previous case in the same court it is held, and as we conceive more correctly, that the connecting carrier at the end of each line is, by the consignment, made the agent of the consignor, to receive and carry forward the goods at the terminus from which they are to be further carried; and that if the goods remain there, by reason of the delay or neglect of the agents of the connecting carrier, beyond a reasonable time, before such connecting carrier receives the same, and are destroyed with-

<sup>1</sup>Conkey v. Mil. & St. Paul Ry. Co., 31 Wis. 619. In this decision, the case of Wood v. The Mil. & St. Paul R. R. Co., 27 Wis. 541, is departed from.

<sup>2</sup>Conkey v. Mil. & St. Paul Ry. Co., 31 Wis. 619.

<sup>3</sup>Conkey v. Mil. & St. Paul Ry. Co., 31 Wis. 619, 637.

out fault of the first carrier, that the liability of such first carrier is but as warehousemen.<sup>1</sup> The reasonable time in which the connecting carrier is to receive and take charge of the goods, is the "earliest practicable time after" the first carrier "is ready to deliver them."<sup>2</sup> Whether such reasonable time has intervened or not before the loss occurs, is a question of fact for the jury to decide.<sup>3</sup>

Evidence of a custom of the company not to become responsible for the conduct of its agents holding the keys to cars, is inadmissible, unless brought home to the other party;<sup>4</sup> nor is evidence of a similar custom admissible, where the car is chartered and loaded and unloaded by the shipper.<sup>5</sup> In the case of a chartered car, the liability of the carrier begins and ends the same as in other cases.<sup>6</sup>

Common carriers must carry the goods through within a reasonable time, unless hindered by the act of Providence or the public enemy; if not, they are responsible.<sup>7</sup> If their road is so obstructed by snow, and there be such an accumulation of freight, that the goods can not go forward within a reasonable time, it is their duty to advise the owners thereof, that they may sell, or find other means of transportation; if they do not, and the price in the meantime falls in the market, they must stand the loss. The company can not store the goods in silence for an indefinite time, and avoid liability.<sup>8</sup>

A carrier is bound, by the ruling in Illinois, if he receives goods marked for carriage to a place beyond his own lines, to carry them to the place of destination thus marked upon them;<sup>9</sup> but

<sup>1</sup> *Schneider v. Evans*, 25 Wis. 241; *Wood v. Crocker*, 18 Wis. 345; *Wood v. Mil. & St. Paul R. R. Co.*, 27 Wis. 541.

<sup>2</sup> *Wood v. Mil. & St. Paul R. R. Co.*, 27 Wis. 541, 553.

<sup>3</sup> *Wood v. Mil. & St. Paul R. R. Co.*, 27 Wis. 541, 554.

<sup>4</sup> *Central R. R. & Banking Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry. Rep. 85.

<sup>5</sup> *Central R. R. & Banking Co. v. Anderson*. And see, as to live stock, *Clark v. St. Louis, Kansas City & Northern Ry. Co.*, 64 Mo. 440, 17 Am.

Ry. Rep. 284.

<sup>6</sup> *Central R. R. & B. Co. v. Anderson*.

<sup>7</sup> *Great Western Ry. Co. of Canada v. Burns and others*, 60 Ill. 284.

<sup>8</sup> *Great Western R. W. Co. of Canada v. Burns and others*, 60 Ill. 284. The carrier is bound to forward the goods of different shippers, each in his turn, and can not leave over goods received, and send forward others afterward received ahead of them, without becoming liable for the damages: *Ib.*

<sup>9</sup> *Chi. & N. W. R. W. Co. v. Montfort and others*, 60 Ill. 175.

the carrier is not bound to thus accept or receive them. By express agreement, his duties may be limited to his own route.<sup>1</sup> The giving of a receipt or bill of lading, limiting, in plain terms, the carriage to the company's own route, will exempt it from liability beyond, if accepted by the shipper with full knowledge, and with approbation thereof.<sup>2</sup> The company can not retain the goods, and force the shipper to receive and assent to the terms of such receipt; but it can refuse to accept them, unless marked differently, and leave the party to find a more acceptable conveyance.

But the rule that common carriers are bound to carry and deliver the goods safely as against all losses, except those occasioned by the act of God or the public enemies, does not render them liable for goods that perish or are deteriorated by reason of their own inherent liability to decay, or to injury from the elements of heat or cold.<sup>3</sup> Thus the carrier is not liable if freights are frozen by the way, without his fault, as where a train is snow bound, and the cargo is frozen; nor is he bound in such case to extricate a car laden with freezable articles in preference to others, if he is ignorant of the character of its freight, although it be practicable so to do.<sup>4</sup>

And though common carriers are bound to carry and deliver within a reasonable time, under ordinary circumstances, except as against the owner's own wrong; the act of God, and the public enemy, yet extraordinary natural occurrences, as, for

<sup>1</sup> Chi. & N. W. R. W. Co. v. Montfort and others, 60 Ill. 175.

<sup>2</sup> Chi. & N. W. R. W. Co. v. Montfort and others, 60 Ill. 175. But a stipulation that goods are shipped at "owner's risk," will not relieve the carrier from liability for his own negligence: Nashville & Chattanooga R. R. Co. v. Jackson, 8 Heisk. 271, 12 Am. Ry. Rep. 54.

<sup>3</sup> Swetland v. Boston & Albany R. R. Co., 102 Mass. 276; Vail v. Pacific R. R. Co., 63 Mo. 230, 20 Am. Ry. Rep. 420.

<sup>4</sup> Swetland v. Boston & Albany R. R. Co., 102 Mass. 276; Vail v. Pac. R. R. Co., *supra*. In such case, the

freezing is held to be the act of God: Vail v. Pac. R. R. Co. If, however, there is unnecessary delay in the transportation, or careless exposure to the cold, the company is liable; this the plaintiff must show: *Ibid*. If frozen while in the cars, at the terminus of the road, the company will not be liable because of a failure to remove them to its warehouse, where the cars afford a better shelter: *Ibid*. In such an action, the expression of a witness that, if shipped as promised, the trees "would have gone through all right," is not objectionable as being a mere opinion: *Ibid*.

instance, unusual freshets, carrying away bridges, and causes of corresponding nature, will excuse them temporarily;<sup>1</sup> but the carriage and performance of duty must be resumed with diligence when the obstructions cease. And if there be a failure, without such excuse of the one kind or the other, to carry and deliver in a reasonable time, the carriers are liable for all damages occasioned by the delay; and the measure of damages is the difference in value and market price when delivered, as contrasted with the same on the day when they should reasonably have been delivered, whether this difference be in the market price, or in the value of the goods by depreciation of quality, or both.<sup>2</sup>

The obligation is not merely to carry safely; the liability of a common carrier of goods is not discharged by carrying to the place of destination; but only by delivery there, after carriage, to the consignee, if called for, and if not called for, then by storing the goods in a suitable place, so that they can be delivered on application therefor. They are to be unloaded and handled with care, and if not called for at their arrival, must be put in a place where they will be reasonably safe and free from injury. Until one or the other is done—that is, the goods delivered, or else so stored for safe keeping—the responsibility of the carrier continues;<sup>3</sup> but when done, it ceases, and that of mere warehouseman takes its place.<sup>4</sup>

As against negligent acts of the shipper, carriers are held

<sup>1</sup> *Dill v. South Car. R. R. Co.*, 7 Rich. Law, 158; *Nashville & Chattanooga R. R. Co. v. Jackson*, 6 Heisk. 271, 12 Am. Ry. Rep. 54. But if there be loss by bad handling, the carrier is liable for that: *Dill v. S. Car. R. R. Co.*, *supra*. Railroad companies are not liable, however, as common carriers, as to baggage of passengers, received and carried as such. The liability in such case differs from that of mere carriers of freight; the baggage appertains to the personal carriage of its owner: *Dill v. The South Car. R. R. Co.*, 7 Rich. Law, 158.

<sup>2</sup> *Shaw & Austin v. South Car. R. R. Co.*, 5 Rich. 462; *Nettles v. South*

*Car. R. R. Co.*, 7 Rich. 190. And the carrier is bound to use ordinary energy and activity to meet the emergency, and save the property: *Lamont & Co. v. Nashville & Chattanooga R. R. Co.*, 9 Heisk. 58, 19 Am. Ry. Rep. 284. And he is bound to notice the signs of impending danger, and act accordingly: *Ibid*. These questions are for the jury: *Ibid*.

<sup>3</sup> *Thomas v. Boston & Providence R. R. Co.*, 10 Met. 472, 477; *Norway Plains Co. v. Boston & Maine R. R. Co.*, 1 Gray, 263, 272; *Rice v. Boston & Worcester R. R. Co.*, 98 Mass. 212.

<sup>4</sup> *Rice v. Boston & Worcester R. R. Co.*, 98 Mass. 212.

only to the exercise of reasonable care and diligence. Thus, where machinery is loaded by the shipper upon a platform car, and is insufficiently secured, so that it breaks from its fastenings and is injured without default of the railroad company, other than their knowledge of such insufficient fastenings, they are not liable.<sup>1</sup>

**8. May limit liability by special contract.**—Railroad companies, as common carriers, have the power to make special contracts of affreightment for the protection of themselves against losses, except as for such losses as are occasioned by their own wrong conduct or negligence; it therefore follows that a contract or bill of lading to transport property, which exempts the company from liability for losses occasioned by fire, will be valid to protect the company in an action for loss by fire, unless the fire or loss be occasioned by the wrong act or negligence of the company.<sup>2</sup> And the common law liability being thus changed, the bur-

<sup>1</sup> *Ross v. Troy & Boston R. R. Co.*, 49 Vt. 364, 17 Am. Ry. Rep. 203.

<sup>2</sup> *Goldey v. Penn. R. R. Co.*, 30 Penn. St. 242; *Farnham v. The Camden & Amboy R. R. Co.*, 55 Penn. St. 53; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335; *Coltón v. Cleveland & Pittsburgh R. R. Co.*, 67 Penn. St. R. 211; *S. C. 5 Am. R.* 424; *Grace v. Adams*, 100 Mass. 505; *S. C. 1 Am. R.* 131; *York Co. v. Cent. R. R. Co.*, 3 Wall. 107; *Express Co. v. Kountze Brothers*, 8 Wall. 342; *Hannibal & St. Jos. R. R. Co. v. Swift*, 12 Wall. 262, 270; *Mich. Cent. R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318; *N. Y. Cent. R. R. Co. v. Lockwood*, 17 Wall. 357; *Evansville & Crawfordsville R. R. Co. v. Androscoggin Mills*, 22 Wall. 594, 11 Am. Ry. Rep. 113; *Fillebrown v. The Grand Trunk R. W. Co.*, 55 Maine, 462; *Ill. Cent. R. R. Co. v. Morrison*, 19 Ill. 136; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457; *Wallace, Supt., v. Matthews*, 39 Geo. 617; *Central R. R. & Banking Co. v. Anderson*, 58 Ga. 393, 16 Am. Ry.

*Rep.* 85; *Erie Ry. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143; *Gaines v. Union Transp. & Ins. Co.*, *Id.* 418, 14 Am. Ry. Rep. 158; *McCoy v. Erie & Western Transp. Co.*, 42 Md. 493, 14 Am. Ry. Rep. 317; *South & North Ala. R. R. Co. v. Henlein*, 56 Ala. 368, 19 Am. Ry. Rep. 200; *Rice v. Kansas Pacific Ry. Co.*, 63 Mo. 314, 20 Am. Ry. Rep. 424; *Snider v. Adams Exp. Co.*, 63 Mo. 376, 20 Am. Ry. Rep. 435; *Hart v. Penn. R. R. Co.*, 2 McCrary, 333; *S. C. 7 Fed. Repr.* 630, 1 Am. and Eng. R. R. Cas., 614, 615. But the company can not limit liability by mere notice, as against the necessity of ordinary care: *Mann et al. v. Birchard et al.*, 40 Vt. 326. But such contracts, in Iowa, are void, under Sec. 1308 of the code: *Brush v. S., A. & D. R. R. Co.*, 43 Ia. 554, 14 Am. Ry. Rep. 479. If the evidence as to the terms of such contract be conflicting, the court will not disturb the verdict of the jury: *Central R. R. & B. Co. v. Anderson*, *supra*.

den of proof, as to where the fault lies, rests upon the plaintiff, seeking to recover of the company. It devolves on the plaintiff, in a suit against a company upon such contract, to aver and prove the loss to have been occasioned by the negligence or wrong act of the defendant.<sup>1</sup>

So, in Louisiana, the company may stipulate, in a receipt given for goods to carry, against liability for loss by fire (except as against loss by its own negligence or fault), and such stipulation will be binding.<sup>2</sup> But where the carrier has stipulated that the goods are shipped at "owner's risk," this will not relieve him from liability for the results of his own negligence; it will be construed only to protect him from the ordinary and known risks of transportation.<sup>3</sup>

Where the bill of lading provides that the carrier shall not be liable beyond an amount named therein, he will still be liable for the full value of the goods, if lost by his negligence, when it is understood by the parties that such sum is less than the real value.\* Such an agreement covers only losses occurring from some other cause than the negligence or fault of the carrier or his servants; and the rule of damages is the same, though less is paid for transportation on this account.<sup>5</sup>

But the policy of the law will not allow a railroad company, or other common carriers, to make contracts in relation to the discharge of their duties as such, releasing or exempting themselves from liability for accidents, injuries or losses, to either property or persons, resulting from or caused by the carelessness or wrong

<sup>1</sup> *Goldey v. Penn. R. R. Co.*, 30 Penn. St. 242; *Farnham v. The Camden & Amboy R. R. Co.*, 55 Penn. St. (5 P. F. Smith), 55; *Camden & Amboy R. R. Co. v. Forsyth*, 61 Penn. St. 81; *Colton v. Cleveland & Pittsburg R. R. Co.*, 67 Penn. St. 211; *York Co. v. Cent. R. R. Co.*, 3 Wall. 107; *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y. 181. But see, *contra*, *United States Exp. Co. v. Backman*, 28 Ohio St. 144, 14 Am. Ry. Rep. 82; *Erie Ry. Co. v. Lockwood*, *supra*. And on failure to make such proof, the court will direct a verdict for the defendant: *Morrison v. Phillips & Colby Const. Co.*,

44 Wis. 405, 19 Am. Ry. Rep. 312.

<sup>2</sup> *Oakey & Hawkins v. Gordon*, 7 La. An. 235; *New Orleans Mutual Ins. Co. v. New Orleans, Jackson & Great Northern R. R. Co.*, 20 La. An. 303; *Levy v. Pontchartrain R. R. Co.*, 23 La. An. 477.

<sup>3</sup> *Nashville & Chattanooga R. R. Co. v. Jackson*, 6 Heisk. 271, 12 Am. Ry. Rep. 54.

<sup>4</sup> *United States Exp. Co. v. Backman*, 28 Ohio St. 144, 14 Am. Ry. Rep. 82. But see *South & North Ala. R. R. Co. v. Henlein*, *supra*; *Hart v. Penn. R. R. Co.*, *supra*.

<sup>5</sup> *U. S. Exp. Co. v. Backman*, *supra*.

act of the companies themselves, or of their servants and employees.<sup>1</sup> Such contracts tend to lessen the care which, in the conduct of such business, the law deems essential to the safety of property or persons in process of transportation, and to increase the risk of all others not participating in the diminution of charges flowing from such special contracts, while at the same time they themselves give the full amount of the ordinary rates.

Though the case cited from 17th of Wallace, *Railroad Company v. Lockwood*, was one involving an injury to a passenger, who was a cattle drover traveling on what purported to be a free pass, yet the Supreme Court of the United States, BRADLEY, Justice, in an elaborate review of the whole question, enunciate the principle that a railroad company can not stipulate lawfully for exemption for loss or injury resulting from its own negligence, or the negligence of its servants, and that the principle applies as well to property as to persons who are being carried for hire; and that a drover traveling on what purports to be a free pass, is nevertheless a passenger for hire, when traveling with and to take care of his live stock, forasmuch as such pass results from the contract of carriage of his property, and is part of the arrangement of the price of carriage or freight.<sup>2</sup>

It results from this principle, that although railroad companies, as common carriers, may restrict their liability as carriers by a special contract, yet they are bound to exercise the same degree of care, in regard to the property to be carried, that an ordinarily prudent person would exercise in regard to it if it

<sup>1</sup> *Wells v. N. Y. Cent. R. R. Co.*, 24 N. Y. 181; *Mynard v. Syracuse, Binghamton & N. Y. R. R. Co.*, 71 N. Y. 180; S. C. 5 Repr. 149, 15 Am. Ry. Rep. 412; *York Co. v. Cent. R. R. Co.*, 3 Wall. 107; *Express Co. v. Kountze Brothers*, 8 Wall. 342; *N. Y. Cent. R. R. Co. v. Lockwood*, 17 Wall. 357; *Pennsylvania R. R. Co. v. Butler*, 57 Penn. St. 335; *School District in Medfield v. Boston, Hartford & Erie R. R. Co.*, 102 Mass. 552; *Welsh & Welsh v. The Pittsburg, Fort Wayne & Chicago R. R. Co.*, 10 Ohio St. 65; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 16

Am. Ry. Rep. 457; *Clark v. St. Louis, Kansas City & Northern Ry. Co.*, 64 Mo. 440, 17 Am. Ry. Rep. 284; *South & North Ala. R. R. Co. v. Henlein*, 56 Ala. 368, 19 Am. Ry. Rep. 200. Such an action arises *ex delicto*, and not *ex contractu*: *Clark v. St. L., K. C. & N. Ry. Co.*, *supra*. Where the action is brought on the contract, the special contract must be set out in the declaration; but where it is in tort for the breach of a duty imposed by law, the contract need not be noticed: *Ibid*.

<sup>2</sup> *Railroad Co. v. Lockwood*, 17 Wall. 357,

were his own;<sup>1</sup> and therefore, a stipulation against liability for "loss or damage by fire, the acts of God, or the enemies of the government, mobs, riots, insurrections or pirates, or from any of the damages incident to a time of war," will not relieve the carrier from liability for loss from one of such causes, if the actual negligence of the carrier contribute to the bringing about the loss—as, for instance, the selecting the more dangerous one of two routes within the carrier's control for the carriage of the property, and the same is lost thereon.<sup>2</sup>

The acceptance of a receipt or bill of lading, embodying in it terms of exemption, under circumstances calculated to attract the attention of a man of ordinary prudence, without making objection thereto, and at the time of delivering the property to the company to be carried, raises, in the absence of other evidence or circumstances to the contrary, the inference of assent thereto on the part of the consignor. It is his duty to read, and in the absence of fraud, the law presumes that this duty was complied with. The carrier, in such case, has a right to the protection stipulated for in the receipt or bill of lading, and is not to be deprived of it by the omission or negligence of the consignor in not reading the terms of consignment.<sup>3</sup> But if a verbal contract of transportation be agreed upon, without restriction, and goods be delivered thereon accordingly, its legal force or effect can not be varied or limited by conditions embodied in a receipt or bill of lading subsequently given to the clerk or consignor who delivers the goods at the station, and who had no express authority to contract with regard thereto.<sup>4</sup> Nor will notice or reading of the special terms be presumed, so as to bind the consignor, where that part of it was so covered by revenue stamps

<sup>1</sup> *Missouri Valley R. R. Co. v. Caldwell*, 8 Kans. 244, 5 Am. Ry. Rep. 287; *Read v. St. Louis, Kansas City & Northern R. R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201.

<sup>2</sup> *Express Co. v. Kountze Bros.*, 8 Wall. 342; *Read v. St. L., K. C. & N. R. R. Co.*, *supra*.

<sup>3</sup> *Grace v. Adams*, 100 Mass. 505; S. C. 1 Am. R. 131; *Squire v. N. Y. Cent. R. R. Co.*, 98 Mass. 239; *Lewis v. Great Western R. W. Co.*, 5 Hurl. & N. 867; *Detroit & Mil. R. R. Co. v. The Farm-*

*ers' & Millers' Bank of Milwaukee*, 20 Wis. 122; *Morrison v. Phillips & Colby Const. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457; *Snider v. Adams Exp. Co.*, 63 Mo. 376, 20 Am. Ry. Rep. 435.

<sup>4</sup> *Fillebrown v. Grand Trunk Ry. Co.*, 55 Maine, 462; *Grace v. Adams*, 100 Mass. 505; S. C. 1 Am. R. 131; *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158.



affixed to the receipt or bill of lading as to prevent its being easily or intelligibly read. To raise such presumption, the proceedings must be open and fair.<sup>1</sup> And an unsigned stipulation on the back of the receipt, limiting liability, will not amount to notice, and will not exempt the carrier.<sup>2</sup>

Nor will the common carrier be exempt entirely from his ordinary common law liability by a general notice to that effect, or restricting the same, even if brought home to the actual knowledge of the consignor, unless the same be assented to by him, either expressly or by clear implication (and mere silence will not always amount to acquiescence); for he has a right to be served, and to be served upon the terms which the law imposes on public carriers as to liability for that which is intrusted for carriage.<sup>3</sup>

By an amendment to the charter of the Baltimore & Ohio Railroad Company, by act of assembly of 1830, the company being authorized to make special contracts in relation to the transportation of live stock, a contract for carriage thereof at reduced rates, in consideration of a release of all damages for injury thereto whilst in transit, or by escape from the cars, or by delay in transportation, agreed to by the owner of such stock, is valid in law, irrespective of what the legal effect thereof would be upon general principles.<sup>4</sup> To recover in an action for damages for injury to or loss of stock transported under such a contract, it devolves upon the plaintiff to not only prove the injury, but also to prove that such injury resulted from the gross negligence of the company, its agents or servants; the burden of proof in that respect is on the plaintiff.<sup>5</sup>

<sup>1</sup> *Perry v. Thompson*, 98 Mass. 249; *Grace v. Adams*, 100 Mass. 505.

<sup>2</sup> *Mich. Cent. R. R. Co. v. Mineral Springs Manuf. Co.*, 16 Wall. 318. And see *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.

<sup>3</sup> *Judson v. Western R. R. Co.*, 6 Allen, 486; *Kimball v. The Rutland & Burlington R. R. Co.*, 26 Vt. 247; *Moses v. The Boston & Maine R. R. Co.*, 4 Foster (24 N. H.), 71; *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 16 Am. Ry. Rep. 457. A consignor, shipping his own goods to a person having a special contract with the carrier for the carriage of freight at reduced rates,

and at the owner's risk, and afterward accounting with the consignee for the charges paid by him at such reduced rates, does not thereby ratify the contract, so that the goods are carried at his risk, unless he had notice of the contract: *White v. Goodrich Transp. Co.*, 46 Wis. 493, 21 Am. Ry. Rep. 398.

<sup>4</sup> *Bankard v. The Baltimore & Ohio R. R. Co.*, 34 Md. 197; S. C. 6 Am. R. 321; *McCann v. Balt. & Ohio R. R. Co.*, 20 Md. 202; *York Co. v. Cent. R. R. Co.*, 3 Wall. 107.

<sup>5</sup> *Bankard v. The Baltimore & Ohio R. R. Co.*, 34 Md. 197; *New Jersey*

In an action growing out of such contract of affreightment, for damages caused by the alleged gross negligence of the company, it is holden that the fact that cars became detached or broke loose from a train, on a curve, and ran back and collided with a train below, and thereby injured plaintiff's cattle, is not of itself proof of gross negligence;<sup>1</sup> nor is the breaking of a car wheel, the running off the track in turning round a curve, or an ordinary collision, of themselves, without other evidence showing that they were caused by the neglect or fault of the company, its servants or agents.<sup>2</sup> Neither of these is sufficient to bring the case within the terms of liability of such special contract, so as to enable plaintiff to recover. Neither will delay in transportation, unless resulting from gross negligence of the company; and mere proof of the delay, without more, will not establish such negligence.<sup>3</sup>

Following the English rulings on the subject, the Supreme Court of Maine, in *Sager v. The Portsmouth, S. & P. & E. Railroad Company*, held, in 1857, that a railroad company may limit its liability as a common carrier, not only by an express contract, but also impliedly, by a general notice of limitation, if the knowledge of the latter be brought home to the party intrusting the property to its care; that under such circumstances the company will be deemed to have exchanged its character of carrier for that of special bailee, and will be entitled to the benefit of the limitation.<sup>4</sup> But where notice is relied on, the burden of

*Steam Nav. Co. v. Merchants' Bank*, 6 How. 384. But see *St. Louis, Kansas City & Northern Ry. Co. v. Piper*, 13 Kans. 505, 8 Am. Ry. Rep. 204.

<sup>1</sup> *Bankard v. B. & O. R. R. Co.*, *supra*.

<sup>2</sup> *Bankard v. B. & O. R. R. Co.*, *supra*.

<sup>3</sup> *Bankard v. The Baltimore & Ohio R. R. Co.*, 34 Md. 197. And where, under a contract exempting the carrier from loss caused by stock jumping from the cars, it appears the owner refused to ship the stock in defendant's car, and they were carried in a car belonging to another road, and were in-

jured by jumping out by reason of the door being open, the defendant company will not be liable for any defect in the door fastenings, without actual knowledge on their part: *Illinois Central R. R. Co. v. Hall*, 58 Ill. 409, 11 Am. Ry. Rep. 95.

<sup>4</sup> *Sager v. The Portsmouth, S. & P. & E. R. R. Co.*, 31 Maine, 228; S. C. 1 Am. R. W. Cases, 171; *Angell on Carriers*, sec. 247; *Beckman v. Shouse*, 5 Rawle, 189; *Bingham v. Rogers*, 6 Watts & Sergt. 500; *Laing v. Colder*, 8 Penn. St. R. 479; S. C. 2 Am. R. W. Cas. 378; *The Camden & Amboy R. R. Co. v. Baldauf*, 16 Penn. St. R. 67; S. C. 2 Am. R. W. Cas. 357.

proof to establish the same rests upon the company.<sup>1</sup> Neither such notice nor contract will shield the company from liability for loss or injury occasioned by the fraud, wrong act or negligence of the company, its agents or servants, nor from injuries resulting from the disobedience of reasonable directions of the owner as to the manner of transportation, consented to by the company at the time of receiving the property to be carried.<sup>2</sup> But when the existence of such contract, or of such notice, and knowledge thereof in plaintiff, is shown, and is of such a character as the law will enforce, the burden of proof is then shifted onto him, and it rests with him to prove such misconduct or negligence of defendant as will charge it with liability for the injury or loss. So, if the plaintiff rely on disobedience of directions as to the manner of transportation, it rests on him to prove the giving of the directions; and when so proven, a failure to follow them again throws the burden of proof on the company, to show that the property is lost or injured without the fault of the company.<sup>3</sup>

As to contracts exempting the carrier from the necessity of using ordinary care, and indemnifying the company from liability for losses occasioned by their own negligence or misconduct while carrying for hire, all such stipulations are void, as against the policy of the law, and as having a tendency to encourage guilty negligence, fraud and crime.<sup>4</sup> Nor can they limit the time in which application shall be made for damages sustained to property being carried.<sup>5</sup>

<sup>1</sup> *Sager v. The Portsmouth, S. & P. & E. R. R. Co.*, 31 Maine, 228; S. C. 1 Am. R. W. Cases, 171; Angell on Carriers, sec. 247; *Laing v. Colder* and others, 8 Penn. St. R. 479; *The Camden & Amboy R. R. Co. v. Baldauf*, 16 Penn. St. R. 67. And see *Gaines v. Union Transp. & Ins. Co.*, 28 Ohio St. 418, 14 Am. Ry. Rep. 158; *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100. #

<sup>2</sup> *Sager v. The Portsmouth, S. & P. & E. R. R. Co.*, 31 Maine, 228; *Laing v. Colder*, 8 Penn. St. R. 479; *Camden & Amboy R. R. Co. v. Baldauf*, 16 Penn. St. R. 67.

<sup>3</sup> *Sager v. The Portsmouth, S. & P. & E. R. R. Co.*, 31 Maine, 228.

<sup>4</sup> *Jones v. Voorhees*, 10 Ohio, 145; *Cleveland, Painesville & Ashtabula R. R. Co. v. Curran*, 19 Ohio St. 1; S. C. 2 Am. R. 362; *Camden & Amboy R. R. Co. v. Baldauf*, 16 Penn. St. R. 67; S. C. 2 Am. R. W. Cas. 357; *Cole v. Goodwin*, 19 Wend. 251; *St. Louis, Kansas City & Northern Ry. Co. v. Piper*, 13 Kans. 505, 8 Am. Ry. Rep. 204.

<sup>5</sup> *Southern Exp. Co. v. Caperton*, 44 Ala. 101. But see, *contra*, *Goggin v. Kansas Pacific Ry. Co.*, 12 Kans. 416, 8 Am. Ry. Rep. 278, in which it is

There are cases of carrying free of charge, however, which may allow of such contracts, and in which they will be enforced; but in such cases the circumstances are such as to relieve the company from its character and corresponding obligations of common carrier—as, for instance, in case of a special agreement to carry a person free, on condition that no liability whatever rest upon the carrier, and there be no other relation between the parties than that arising from the agreement.<sup>1</sup>

In Illinois it is holden that merchantable corn does not come within the term “perishable property,” and that a provision in a contract for railroad transportation releasing the company from loss on perishable property, does not protect such company from liability for merchantable corn spoiled and lost by reason of a failure to transport and deliver the same within a reasonable time.<sup>2</sup> The Supreme Court of that state, WALKER, Justice, say: “Perishable property, in the commercial sense, is that which, from its nature, decays in a short space of time, without reference to the care it receives.”<sup>3</sup>

The ruling in Wisconsin is, that the acceptance of a receipt for goods to transport, with knowledge of restrictive conditions annexed thereto as to the liability of the company, will bind the shipper to the conditions, if he retain the same and make no objection thereto, and it still be in time to avail himself by objection;<sup>4</sup> but where the goods had started *en route* before the delivery of such a receipt, it was held allowable to admit parol evidence to show the true contract, and to rebut the restrictive conditions of the receipt.<sup>5</sup> But if the knowledge of the restrictive clause be not brought home to the party by proof, then he will

held that a regulation that damages shall not be allowed unless claimed at or before the unloading of stock, is reasonable. See, also, *Rice v. Same*, 63 Mo. 314, 20 Am. Ry. Rep. 424, in which the principal question was not decided, but it was held the proof showed a substantial compliance with the purpose of the contract, *i. e.*, to give the company an opportunity to inspect the stock before they were taken away or slaughtered, and ascertain for itself the extent of the damage; and that, by their conduct, the company had

waived the delay.

<sup>1</sup> *Kinney v. The Cent. R. R. Co. of New Jersey*, 34 N. J. 513; S. C. 3 Am. R. 265.

<sup>2</sup> *Illinois Cent. R. R. Co. v. McClellan*, 54 Ill. 58; S. C. 5 Am. R. 83.

<sup>3</sup> *Illinois Cent. R. R. Co. v. McClellan*, 54 Ill. 58.

<sup>4</sup> *Strohn and another v. The Detroit & Mil. Ry. Co.*, 21 Wis. 554; *Morrison v. Phillips & Colby Const. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312.

<sup>5</sup> *Strohn and another v. Detroit & Mil. Ry. Co.*, 21 Wis. 554.

not be bound thereby. To attempt thus to alter or evade an agreement orally made for affreightment, would be fraudulent.<sup>1</sup>

And so in Virginia, the doctrine is, that a railroad corporation may not only secure itself by express contract, but also by notice actually brought to the knowledge of the shipper, against liability as insurer, and also against losses of property of value, of the character of which the company were not informed; as also for loss from innate liability of the article to decay, or for loss of animals, which are by nature liable to be unruly; except so far as any such losses occur by the neglect or fault of the company itself.<sup>2</sup> And so in West Virginia, as against all loss, except it occur by misfeasance or fraud of the carrier, provided the contract be explicit.<sup>3</sup>

In Pennsylvania the ruling is, and uniformly has been, that common carriers can not, by special contract, relieve themselves from liability for losses or injuries resulting from their own negligence. The courts of that state, says Judge READ, in *Pennsylvania Railroad Company v. Henderson*, "have always adhered to one rule with regard to the limitation of their liability by common carriers, from *Beckman v. Shouse*, 5 Rawle, 179, decided on the 30th March, 1835, to *Goldey v. Pennsylvania Railroad Company*, 6 Casey, 246, decided in 1858, a period of twenty-three years, and such is still the doctrine of our courts."<sup>4</sup>

But special agreements of exemption of the company from liability, executed by the shipper, after a portion of the goods had been unconditionally received for carriage by the company, and already lost by it, do not exempt the company from the loss already incurred, although intended to cover those as to their carriage, the loss of the same being then unknown to the owners or shippers. Such contract operates prospectively; and so, also, as to damages from unreasonable delay.<sup>5</sup>

<sup>1</sup> *Strohn and another v. Detroit & Mil. Ry. Co.*, 21 Wis. 554.

<sup>2</sup> *Virginia & Tenn. R. R. Co. v. Sayers*, 26 Gratt. 328.

<sup>3</sup> *Baltimore & Ohio R. R. Co. v. Rathbone*, 1 West Va. 87; *Baltimore & Ohio R. R. Co. v. Skeels*, 3 West Va. 556.

<sup>4</sup> *Pennsylvania R. R. Co. v. Henderson*, 51 Penn. St. 315, 329, 330. And

this rule obtains in Kansas: *St. Louis, Kansas City & Northern Ry. Co. v. Piper*, 13 Kans. 505, 8 Am. Ry. Rep. 204.

<sup>5</sup> *Detroit & Milwaukee Ry. Co. v. Adams and others*, 15 Mich. (2 Jennison), 458; *Cleveland & Toledo R. R. Co. v. Perkins*, 17 Mich. (4 Jennison), 296.

Where a railroad company has established two sets of rates, one covering their ordinary common law liability, and a lower rate in consideration of the limitation of their liability, so as to cover nothing but willful misconduct of their servants, and the plaintiff ships his goods at "owner's risk," it will be intended that thereby he shipped them at the lower rate, and for injuries to the goods occasioned by mere negligence of the defendant or its servants, no recovery can be had.<sup>1</sup>

However the terms of exemption may be understood in their ordinary sense, it is competent for the parties to attach thereto other unusual or arbitrary meaning;<sup>2</sup> but such meaning should be plain, and free from reasonable doubt.<sup>3</sup> Where the railroad company was exempted by the bill of lading from damage or deficiency in *packages*, it was held this exemption was intended to apply only to the unknown contents of packages, and did not apply to corn shipped in bulk.<sup>4</sup> Where the mode of estimating the loss or damage is provided for by the bill of lading, no parol explanation, or evidence of the course of dealing between the parties, is admissible to ascertain the extent of the damages.<sup>5</sup>

**9. Liability for through freights.**—Liability of a railroad company, as carriers, for through freights transported over its line for points beyond the terminus of its road, continues only until the arrival of the goods at such terminus, and notice thereof, and of readiness to deliver the same, be given to the connecting line which is designed to receive them, and also, for a reasonable time after such notice to enable such connecting line to take the goods away.<sup>6</sup> If, after such notice, and the lapse of a reasonable time therefor, the goods be not taken by the

<sup>1</sup> *Lewis v. Great Western Ry. Co.*, Law Rep. 3 Q. B. Div. 195, 15 Am. Ry. Rep. 601.

<sup>2</sup> *McCoy v. Erie & Western Transp. Co.*, 42 Md. 498, 14 Am. Ry. Rep. 317.

<sup>3</sup> *McCoy v. E. & W. Trans. Co.*

<sup>4</sup> *McCoy v. E. & W. Trans. Co.*

<sup>5</sup> *McCoy v. E. & W. Trans. Co.*

<sup>6</sup> *McDonald v. The Western R. R. Co.*, 34 N. Y. 497; *Mills and others v. The Mich. Cent. R. R. Co.*, 45 N.

Y. 622; S. C. 6 Am. R. 152; *Lawrence v. The Winona & St. Peter R. R. Co.*, 15 Minn. 390; S. C. 2 Am. R. 130; *Mich. Cent. R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318; *Naugatuck R. R. Co. v. The Waterbury Button Company*, 24 Conn. 468; *McMillan and another v. Mich. S. & N. Ind. R. R. Co.*, 16 Mich. 79; *Louisville & Nashville R. R. Co. v. Campbell*, 7 Heisk. 253, 12 Am. Ry. Rep. 490.

connecting line, the company may terminate its liability as carrier by a proper storage of the goods.<sup>1</sup>

The mere receipt of goods by a railroad company for transportation, marked and directed to a place beyond the terminus of its own line, does not impose on the company any obligation to carry the same beyond such terminus;<sup>2</sup> nor does it impose on the company so receiving the same any liability for injury to or loss of the goods, caused or incurred at any place beyond such terminus.<sup>3</sup> The English authorities tending to a different ruling have not been recognized as authority, or followed in this country.<sup>4</sup>

In the case cited from 1 Gray, the receipt given by the defendant for the goods was to "transport to New York," which was beyond the terminus of the company's own line, and was the place to which the goods were directed; but these being common with the company beyond such terminus, and no pay received for transportation further than over defendant's own line, the court held the defendant clear of liability beyond its own line. The court say: "that obligation is nothing more than to transport the goods safely to the end of their road, and there deliver them to the proper carriers, to be forwarded toward their ultimate destination"—"If they can be held liable for a loss that happens on any railroad besides their own, we know not what is the limit of their liability."<sup>5</sup>

Nor will the legal relations of the company receiving the

<sup>1</sup> Mills and others v. Mich. Cent. R. Co., 45 N. Y. 622; Railroad Company v. Manufacturing Co., 16 Wall. 318; Louisville & Nashville R. R. Co. v. Campbell, *supra*. In Minnesota, it is held that the carrier is bound to deliver to the connecting line, and is not released from liability by storage: Irish v. Milwaukee & St. Paul Ry. Co., 19 Minn. 376, 19 Am. Ry. Rep. 89.

<sup>2</sup> Elmore v. Naugatuck R. R. Co., 23 Conn. 457; Naugatuck R. R. Co. v. The Waterbury Button Co., 24 Conn. 468; Nutting v. Conn. River R. R. Co., 1 Gray, 502; Detroit & Bay City Ry. Co. v. McKenzie, 43 Mich. 609; S. C. 5 N. W. Rep. 1031, 21 Am. Ry. Rep. 157. Especially where the bill of lading

shows a contract to carry to a point short of the direction: Merchants' Disp. & Trans. Co. v. Moore, 88 Ill. 136, 21 Am. Ry. Rep. 293.

<sup>3</sup> Elmore v. The Naugatuck R. R. Co., 23 Conn. 457; Naugatuck R. R. Co. v. The Waterbury Button Co., 24 Conn. 468.

<sup>4</sup> Hood v. N. York & N. Haven R. R. Co., 22 Conn. 1; Elmore v. Naugatuck R. R. Co., 23 Conn. 457; Vansantvoord v. St. John, 6 Hill, 157; Farmers' & Mechanics' Bank v. Champlain Transp. Co., 18 Vt. 140, and 23 *ib.* 209.

<sup>5</sup> Nutting v. Conn. River R. R. Co., 1 Gray, 502, 504; Elmore v. Naugatuck R. R. Co., 23 Conn. 457, 473.

freight for shipment be altered, in respect to through liability toward the consignor or owner, by reason of an advertisement coming to the knowledge of the shipper, and held out by the railroad company, as follows:

“NAUGATUCK RAILROAD.

“TO FREIGHT SHIPPERS. Freight will be way-billed from each station for New York, New Haven and Bridgeport.

☞ The facilities for transporting freight having been greatly increased, shippers may rest assured that their goods will be taken through to their destination with despatch.

“PHILO HURD, Superintendent.

“BRIDGEPORT, April 29, 1852.”<sup>1</sup>

In regard to this advertisement, the Supreme Court of Connecticut, ELLSWORTH, Justice, say: “This notice, when justly considered, in our judgment, furnishes but little, if any, evidence of a special contract to transport, beyond what the law itself implies. It gives notice how all freight received on the defendant’s road will be arranged and classified, in the defendant’s way-bill, and generally, that the facilities for transporting freight are greatly improved, and may be considered certain. Circumstances of a like character, only much stronger, were pressed upon us in the case of *Hood v. The New York & New Haven Railroad Co.*; but they were then held to be equivocal and indecisive, and we did then, as we do now, attach but little importance to such general testimony, especially when, if all other evidence in the case is taken into consideration, such general testimony is fully explained.”<sup>2</sup>

Where the goods are destroyed by fire after their arrival at such terminus, and before delivery thereof to the connecting line, and before notice of their arrival, and the expiration of a reasonable time for taking the same away, the company are liable for their loss. In such case, the relation of carrier is not changed.<sup>3</sup> And if, at the terminus of a line, the goods be there

<sup>1</sup> *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457.

<sup>2</sup> *Elmore v. Naugatuck R. R. Co.*, 23 Conn. 457, 475.

<sup>3</sup> *Mills v. Mich. Cent. R. R. Co.*, 45 N. Y. 622; *S. C. 6 Am. R.* 152; *Law-*

*rence v. The Winona & St. Peter R. R. Co.*, 15 Minn. 390; *Mich. Cent. R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318; *Erie Ry. Co. v. Lockwood*, 28 Ohio St. 358, 14 Am. Ry. Rep. 143.



detained for the convenience of such line, in view of arrangements of such line with a particular carrier, between there and their destination, and during such detention they be destroyed by fire, the company so detaining them are liable, in the absence of notice to the consignee or connecting line.<sup>1</sup>

In the case cited from 16 Wallace, the Supreme Court of the United States, DAVIS, Justice, say: "it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond"; that this rule of liability is adopted generally by the courts of this country, although in England, and in some of the states, there is a disposition to treat the obligation of the carrier first receiving the goods as continuing throughout the entire route; but that "the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction."<sup>2</sup> In the same connection, however, that court add, that "public policy \* \* \* requires that the rule should be enforced, and will not allow the carrier to escape responsibility on storing the goods at the end of his route, without delivery or an attempt to deliver to the connecting carrier"; that in such case the carrier must do some act indicating his intention to renounce his obligation as carrier, in addition to a simple notice of arrival, and deposit of the goods in the carrier's depot—as, for instance, notice of readiness to deliver, and then if not received in a reasonable time thereafter by the connecting line, a warehousing of the goods safely in the carrier's, or other proper warehouse, will discharge him from liability as a common carrier.<sup>3</sup>

It is the duty of railroad companies, as common carriers, not only to receive, keep and safely transport the goods intrusted to them for carriage, with reasonable despatch, to their place of destination, on the line of their roads, and there to deliver the same to the consignee on application, upon demand, within a reasonable time after their arrival, but also, if the goods are received to be carried and forwarded to some one apart from or beyond the company's own route, and the direction is to a particular person

<sup>1</sup> Lawrence v. Winona & St. Peter R. R. Co., 15 Minn. 390; S. C. 2 Am. R. 130; Railroad Co. v. Manufacturing Co., 16 Wall. 318.

<sup>2</sup> Railroad Co. v. Manufacturing Co., 16 Wall. 318, 324.

<sup>3</sup> Railroad Co. v. Manufacturing Co., 16 Wall. 318, 324, 325.

at such place of trans-shipment, or from which they are to be forwarded, then on their arrival there, the company should give notice to such consignee, at the time of delivering the goods to him, of the instruction received by the company as to forwarding to the ultimate place of destination.<sup>1</sup>

In case of a through freight contract, where a condition for limited liability is embodied in the receipt or bill of lading, which according to the course of transportation is inoperative, then liability continues over the whole line, just as if such supposed exemption had not been stipulated for; for instance, if the condition of exemption be, that the responsibility of the first company should cease "when the goods are unloaded from the cars" at the terminus of such company's road, and the course of business showed that freights were always forwarded thence in the cars in which they arrived, and were never unloaded at such terminus, it is holden that in case of loss, recovery may be had against such first company, as on a through freight contract, notwithstanding such stipulation for exemption.<sup>2</sup>

**10. Liability of connecting lines.**—The receipt, by a common carrier, of property to be carried and forwarded to the place of final destination, under an agreement, expressed in the receipt given for the same, that the company "are not to be held liable for a loss or damage except as forwarders only," amounts to an obligation only to carry the property safely over the company's own line to the termination thereof, and to there forward it from such terminus by a connecting route, in the like condition in which it was when received.<sup>3</sup>

And where the common carrier, receiving goods to be carried and forwarded, stipulates in its receipt for the goods, or in the bill of lading, that it shall not be liable for loss by fire, nor for any loss occurring beyond the terminus of its own line, such

<sup>1</sup> *Selma & Meridian R. R. Co. v. Butts & Foster*, 43 Ala. 385.

<sup>2</sup> *Toledo, P. & W. Ry. Co. v. Merri-man*, 52 Ill. 123; S. C. 4 Am. R. 590.

<sup>3</sup> *Lamb v. The Camden & Amboy R. R. & Transportation Co.*, 46 N. Y. 271; *Reed v. U. S. Express Co.*, 48 N. Y. 462; S. C. 8 Am. R. 561; *Colton v. Cleveland & Pittsburg R. R. Co.*, 67 Penn. St. 211; *Garside v. Proprietors*

of Trent & Mersey Nav., 1 Eng. R. W. & C. Cases, 568; *Bryan v. Memphis & Paducah R. R. Co.*, 11 Bush, 597, 14 Am. Ry. Rep. 395; *Snider v. Adams Exp. Co.*, 63 Mo. 376, 20 Am. Ry. Rep. 435. But see *St. Louis, Kansas City & Northern Ry. Co. v. Piper*, 13 Kans. 505, 8 Am. Ry. Rep. 204.

carrier may make a like stipulation with the company or companies to whom the same is delivered for further carriage, at the terminus of its line, and such stipulation will be binding upon the consignor; and so may the agent of such original line, to whom, or to whose care, the goods are consigned by such company originally receiving the same.<sup>1</sup> But if the loss by fire be occasioned by the carrier's own negligence, then such carrier by whose negligence the loss occurs, is liable for the loss, notwithstanding such stipulation for exemption.<sup>2</sup> It will not be intended that such contract was designed to protect the carrier from the consequences of its own negligence; nor would the policy of the law countenance such a stipulation, if made.

The burden of proof, however, in an action for loss by fire, arising under such a contract of exemption from loss by fire, is cast upon the plaintiff, to show the loss to have been occasioned by reason of defendant's negligence;<sup>3</sup> for the ordinary character of insurer is put aside by such a contract. The carrier is no longer bound absolutely, if the loss is by fire; but only if it flow from negligence on his part.

To avoid responsibility for loss of goods which may occur by misdirection on the next connecting route, there should be forwarded with the goods the instructions, or copies thereof, received from the consignor. In default thereof, they are bound for all loss occasioned by such neglect.<sup>4</sup> Mere marks and labels attached to or placed on the goods, will not excuse the omission of proper instructions.<sup>5</sup>

It is the duty of the company to be careful to understand and follow the directions marked upon the goods to be carried. An error in this respect, if the fault of its own agent, may render the company liable;<sup>6</sup> if the fault of the consignor's, as for illegibility, or other cause calculated to mislead, he must take

<sup>1</sup> *Lamb v. Camden & Amboy R. R. & Transportation Co.*, 46 N. Y. 271; S. C. 7 Am. R. 327; *Colton v. Cleveland & Pittsburg R. R. Co.*, 67 Penn. St. 211.

<sup>2</sup> *Lamb v. Camden & Amboy R. R. & Transportation Co.*, 46 N. Y. 271; S. C. 7 Am. R. 327; *Colton v. Cleveland & Pittsburg R. R. Co.*, 67 Penn. St. 211.

<sup>3</sup> *Lamb v. Camden & Amboy R. R. & Transportation Co.*, 46 N. Y. 271; *Colton v. Cleveland & Pittsburg R. R. Co.*, 67 Penn. St. 211.

<sup>4</sup> *Little Miami R. R. Co. v. Washburn*, 22 Ohio St. 324.

<sup>5</sup> *Little Miami R. R. Co. v. Washburn*, *supra*.

<sup>6</sup> *Congar v. The Galena & Chi. Union R. R. Co.*, 17 Wis. 477.

the consequences. It is the duty of the carrier, if on a merely connecting line, to deliver the goods to the next connecting line indicated by the direction on the goods; and if there be no direction, then to deliver them to the proper company, to be forwarded by the usual road.<sup>1</sup> The question of negligence as to the direction on the goods, and of covering thereto by the company, is for the jury to decide.<sup>2</sup>

The suit for loss or injury of the goods is properly brought, as to the party plaintiff, if in the name of the real owner; and although the law presumes the consignee to be such, under ordinary circumstances, yet that presumption may be rebutted and explained by evidence; and if from the evidence it appears that the action is brought by the real owner, then there is no longer any ground for claiming that the action should be by the consignee.<sup>3</sup>

The carrier can not dispute the title of the consignor of goods to be carried, in an action for loss or injury, on the mere ground that the consignor, being a corporation, has no capacity to hold or own such goods, or that the purchase or ownership thereof by the consignor is unlawful.<sup>4</sup> Though the consignor be a corporation, and the goods be of a character which it may not ordinarily deal in, or may have been obtained in violation of its charter, yet that question can not arise in an action for their loss.<sup>5</sup>

A company receiving freight for transportation to a connecting line, is not excused from so doing by a block in the line of transportation on such connecting line, or beyond it on the next, by an excess of freight or other cause; but must, in a reasonable time, carry forward the goods over its own line to the terminus thereof, and there offer to deliver them to the agents of such line.<sup>6</sup> If having done so, there be a refusal to receive them, then the fault and responsibility is on the connecting

<sup>1</sup> *Congar v. The Galena & Chi. Union R. R. Co.*, 17 Wis. 477, 484, 485.

<sup>2</sup> *Congar v. The Galena & Chi. Union R. R. Co.*, 17 Wis. 477.

<sup>3</sup> *Congar v. The Galena & Chi. Union R. R. Co.*, 17 Wis. 477, 485, 486.

<sup>4</sup> *The Farmers' & Millers' Bank v. The Detroit & Mil. R. R. Co.*, 17 Wis. 372.

<sup>5</sup> *The Farmers' & Millers' Bank v. The Detroit & Mil. R. R. Co.*, 17 Wis. 372.

<sup>6</sup> *McLaren and another v. Detroit & Mil. R. R. Co.*, 23 Wis. 138.

line, and the first carrier will be discharged as carrier for the same up to that time.<sup>1</sup>

Each carrier on merely connecting lines, has, in turn, its lien upon the goods carried over its line, for the cost of carriage or freight over its own line, as also for the back charges of freights and handling on the line or lines preceding, and paid by it on receipt of the goods.<sup>2</sup> This lien exists for the full amount of the ordinary freights and charges, in favor of each of such lines, including the last line of the route, where it has paid the whole, notwithstanding the first carrier, by a special contract not known to the others, guarantees the through carriage at an under rate.<sup>3</sup> *Quære*, if the legal result as to the rights of the parties would have been different if the special contract of the first carrier, guaranteeing the carriage at an under rate, had been known to the agents of the subsequent ones.<sup>4</sup> The remedy of the consignor in such case is against the carrier to whom he consigns the goods, in an action for breach of guaranty, and not by recoupment of the amount charged in excess of the guaranty at the end of the route. The agent there may hold the goods until all the charges of transportation advanced by it, and its own, are paid.<sup>5</sup>

The New York statute of 1847, declaring that where two or more railroads are connected together, any company owning either of said roads, receiving freight to be transported to any place on the line of either of said roads so connected, shall be liable as common carriers for the delivery of such freight at such place, is held by the court of appeals of that state to merely recognize the common law power of such companies to make through contracts for the delivery of freight, and not to deny to them the privilege of receiving freights with the ordinary obligation of carriage over their own lines only;<sup>6</sup> and that therefore a rail-

<sup>1</sup> McLaren and another v. Detroit & Mil. R. R. Co., 23 Wis. 138.

<sup>2</sup> Schneider v. Evans, 25 Wis. 241.

<sup>3</sup> Schneider v. Evans, 25 Wis. 241. But see Evansville & Crawfordsville R. R. Co. v. Marsh, 57 Ind. 505, 18 Am. Ry. Rep. 482. It is here held that the latter company must deliver to the consignee upon tender of the agreed freight, provided it cover his own charges, irrespective of the charges of

the other road. On failure to do so, the consignee may maintain replevin.

<sup>4</sup> Schneider v. Evans, 25 Wis. 241.

In such case the latter company, party to such agreement, is absolutely bound to deliver on payment of the agreed price: E. & C. R. R. Co. v. Marsh, *supra*.

<sup>5</sup> Schneider v. Evans, 25 Wis. 241.

<sup>6</sup> Burtis v. The Buffalo & State Line R. R. Co., 24 N. Y. (10 Smith), 269;

road company assuming to contract, and actually contracting, to deliver freight, within a given time, at a place beyond the terminus of its own road, is liable on such contract, even though the place of delivery be at a point beyond the boundary of that state.<sup>1</sup> The said statute is said to apply as well to companies connecting with roads of other states, at the state line, as to roads mutually domestic, or within the state.<sup>2</sup>

But this statute does not introduce the English doctrine, which implies an undertaking to carry to the place of destination marked on the goods,<sup>3</sup> though beyond the route of the company receiving the goods for carriage; but is to be regarded as merely giving effect to contracts made, or a right to make contracts, with New York railroad companies, to carry beyond the corporate

Root v. The Great Western R. R. Co., 45 N. Y. 524.

<sup>1</sup> Burtis v. The Buffalo & State Line R. R. Co., 24 N. Y. (10 Smith), 269.

<sup>2</sup> Burtis v. The Buffalo & State Line R. R. Co., 24 N. Y. 269.

<sup>3</sup> In Root v. The Great Western R. R. Company, 45 N. Y. 524, 529, 530, the New York Court of Appeals, RAPALLO, J., say: The ruling in England is, that the company first receiving the goods marked for a particular place, without expressly limiting its responsibility, undertakes *prima facie* to carry them to their destination, even though beyond the limits of the company's route, and is to be regarded as a carrier throughout the entire route, to the place to which the goods are directed; and that this rule applies when the goods are directed to points even beyond the limits of England. They hold also that the contract is with the first company, and that there is no right of action in favor of the owner against any of the subsequent companies on the route. Muschamp v. Lancaster & P. J. R. W., 8 M. & W. 421; Watson v. Ambergate, N. & B. R. W., 3 Eng. L. & Eq. 497; Scothorn v. S. Staffordshire R. W., 8 Exch. 341; S. C. 18 Eng. L. & E. 553; Wilson

v. York, N. & B. R. W., 18 Eng. L. & Eq. 557; Crouch v. London & N. W. R. W. Co., 25 Eng. L. & Eq. 287; Bristol & Ex. R. W. v. Collins, 7 Ho. Lds. Cas. 194.

But that the prevailing rule in the American States is different; that here, a receipt or bill of lading, marked for a place beyond the terminus of the carrier's route, does not import a contract to carry them to their final destination; that in the absence of a special contract, or of a partnership between the connecting lines, the carrier is only responsible to the extent of his own route, and for safe delivery to the next connecting carrier; that in such case the carrier is only a forwarder from the terminus of his own line; and that for goods thus marked, and delivered to a carrier, unaccompanied by any particular directions other than such as are to be inferred from the marks, the carrier is only bound to deliver them at the terminus of his own line, according to the established custom of his business: Root v. The Great Western R. R. Co., 45 N. Y. 529, 530; and, to the same purport, see Babcock v. Lake Shore & Mich. Southern R. W. Co., 49 N. Y. (4 Sickels), 491.

terminus of their respective roads, which right had before been doubted, and to define the nature of the responsibility imposed by such contracts, and not to create a contract for through carriage when no express contract to that effect is made.<sup>1</sup> The company, notwithstanding this statute, may still make special contracts, and for special rates, limiting their liability at common law, and agreeing to carry to, and deliver over to, connecting carriers at the end of their own route.<sup>2</sup> But such special contract does not extend to, or apply to, the carriage of the goods on the connecting lines, unless an intention so to extend it is shown by the contract or manner of doing business, and there be authority to contract for such connecting line or lines. "The limitation of the carrier's liability by the contract is necessarily confined to the service contracted for, and the carriers who were parties to it." The responsibility of the connecting lines is in such cases that of ordinary common carriers.<sup>3</sup>

It is the duty of each connecting line or carrier, in turn, on the arrival of the goods at the terminus of its line, to notify the next line thereof, and deliver over to it the goods without delay.<sup>4</sup> If, on the arrival of the goods at the company's terminus, the connecting line do not receive them, it is the duty of the company to store them; and if then lost by fire, without its fault, it is not liable therefor.<sup>5</sup>

The receipt of such connecting line, that the goods were received by it in good order, will not discharge the first carrier from liability, if given without examination of the goods. It is not evidence of the condition in which the goods were deliv-

<sup>1</sup> *Root v. The Great Western R. R. Co.*, 45 N. Y. (6 Hand), 524, 531, 532; *Burtis v. The Buffalo & State Line R. R. Co.*, 24 N. Y. 269. But it is also held that this statute applies only to the company first receiving the goods from the shipper, and not to any intermediate company on the route: *Root v. Great Western R. R. Co.*, 45 N. Y. 533.

<sup>2</sup> *Babcock v. The Lake Shore & Mich. Southern R. W. Co.*, 49 N. Y. (4 Sickels), 491, 497; *Lamb and an-*

*other v. The Camden & Amboy R. R. & Trans. Co.*, 46 N. Y. 271.

<sup>3</sup> *Babcock v. The Lake Shore & Mich. Southern Ry. Co.*, 49 N. Y. 491, 497.

<sup>4</sup> *McDonald v. The Western R. R. Co.*, 34 N. Y. (7 Tiffany), 497; *Irish v. Milwaukee & St. Paul Ry. Co.*, 19 Minn. 376, 19 Am. Ry. Rep. 89.

<sup>5</sup> *Garside v. Proprietors of the Trent & Mersey Navigation*, 1 Eng. R. W. & C. Cases, 568.

ered over, and is at best but a mere statement of a third party, in nowise connected with the action;<sup>1</sup> it is, as to such first carrier, but hearsay.

In the absence of evidence, the presumption is, in case of the loss of the contents of a package, showing no external indication of the loss, that it occurred through the fault of the last carrier;<sup>2</sup> and the burden of proof is on the defendant to establish an injury to the goods by some other of the connecting lines. If they fail to make such proof, they are liable.<sup>3</sup>

While the Supreme Court of Minnesota recognizes as correct the more prevalent or general rule of the American courts, that a railroad company, or other common carrier, receiving goods for carriage over its own line, and for delivery to some other connecting line or carrier, is relieved from the responsibility of carrier, and assumes that of warehouseman, if, having faithfully carried the goods to their destination, and there being ready to deliver over the same, and having given notice thereof, they be not taken away in a reasonable time, stores the same for safe keeping, ready to be delivered when called for,<sup>4</sup> yet said court also holds that this principle does not apply to cases where the goods are stored and detained for the accommodation or favor of a particular line or carrier, under a business understanding between them; and that in the latter case, the liability of carrier continues, and if the goods be lost while thus stored, the carrier is liable for the loss.<sup>5</sup>

Where the bill of lading is silent on the subject, and is in no respect contradicted in any of its terms thereby, parol evidence may be given as to the practice of shippers in giving directions in forwarding goods consigned, by delivering them to the next carrier on the line of transportation directed by the bill of lading.<sup>6</sup> And where, by the bill of lading, it is apparent that the

<sup>1</sup> *Hunt v. The Michigan Southern & Northern Indiana R. R. Co.*, 37 N. Y. (10 Tiffany), 162.

<sup>2</sup> *Laughlin v. Chicago & Northwestern Ry. Co.*, 28 Wis. 204, 5 Am. Ry. Rep. 323.

<sup>3</sup> *Dixon v. Richmond & Danville R. R. Co.*, 74 N. Car. 538, 13 Am. Ry. Rep. 99.

<sup>4</sup> *Lawrence v. Winona & St. Peter R. R. Co.*, 15 Min. 390; *Farmers' &*

*Mech. Bank v. Champlain Tr. Co.*, 23 Vt. 186; *Thomas v. Boston & Prov. R. R. Co.*, 10 Met. 472. Such, too, is the rule of the earlier English cases: *Garside v. Trent & Mersey Nav. Co.*, 4 Term R. 581.

<sup>5</sup> *Lawrence v. Winona & St. Peter R. R. Co.*, 15 Min. 390.

<sup>6</sup> *Hooper v. Chicago & N. Western Ry. Co.*, 27 Wis. 81. Where a custom is relied upon by the defendant



place of final consignment is further on, it is to be inferred, in the absence of other facts or stipulations, that the goods are to be transferred to the next connecting line of carriers on the route thus indicated.<sup>1</sup> In such cases, the law of Illinois in relation to the storage of goods shipped in other states, and exemption thereby as carrier, when they arrive at the end of the carrier's route, does not apply to goods in transit over connecting lines of road, to be forwarded on their arrival at the terminus or end of one of such lines.<sup>2</sup> It is the duty of the latter to pass the goods over, or be ready and offer to pass them over, to the next connecting line, after which only, if not accepted by the latter, the original carrier, or carrier having them thus in hand, may store them until actually accepted by the other line.

Not so, however, when the goods have been sent by authority of the consignor or his forwarding agent. When an owner of goods delivers them to a carrier to be transported over his route, and thence over the route or routes of a succeeding carrier or carriers, he makes and constitutes the person to whom he delivers them his forwarding agent, for whose acts, in the execution of such agency, he is himself responsible;<sup>3</sup> therefore, where several successive carriers carry the goods according to the directions given by the forwarding agent or first company, they act under the direction and authority of the owner, and can not be considered as wrong-doers, although the goods be carried to a wrong place, and to one not intended by the owner.<sup>4</sup>

It follows from these principles, that in such cases the carriers have their liens, not only for freights over their own lines, but for back freights and charges paid by them upon the goods;<sup>5</sup> and having such lien, they can not, either by transportation thereof over

in regard to the delivery of the goods to the succeeding carrier, the burden of proof lies upon him to establish it: *Irish v. Milwaukee & St. Paul Ry. Co.*, 19 Minn. 376, 19 Am. Ry. Rep. 89.

<sup>1</sup> *Hooper v. Chicago & N. Western Ry. Co.*, 27 Wis. 81. And see *Irish v. M. & St. P. Ry. Co.*, *supra*. In such case, the liability of the first carrier continues as carrier until the transfer or delivery over to the next carrier is completed, so far as completion devolves on such first carrier: *Ib.*

<sup>2</sup> *Hooper v. Chi. & N. Western R. W. Co.*, 27 Wis. 81.

<sup>3</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246, 250. The forwarding agent thus created is liable to the shipper only for the observance of reasonable care in forwarding the goods: *Northern R. R. Co. v. Fitchburg R. R. Co.*, 6 Allen, 254.

<sup>4</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246, 250.

<sup>5</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246.

their own road, or by its detention for the enforcing such lien, be held to have converted the same to their own use.<sup>1</sup> This lien, however, gives only the right of retaining the property until it is discharged by payment; it gives no power to sell the goods to obtain payment of the lien, unless there be statutory authority so to do.<sup>2</sup> Such a sale, when unauthorized by statute, amounts to a conversion of the goods, and renders the company liable for all right and interest which the owner then has in the goods, with their value at the time of sale, less the amount of the lien upon them.<sup>3</sup> If the carrier will sell, other than when the statute allows it, he may find a remedy and means of selling by judicial proceedings to enforce the lien. Sales in such cases, unless of articles allowed by statute to be sold, can not be made by the carrier; nor although the articles are liable to spoil if kept on hand.<sup>4</sup> Hence it is that statutory authority is sometimes conferred on the carrier to sell, but it is mostly of perishable articles.<sup>5</sup>

**11. Liability of continuous lines.**—Though there be no actual consolidation, yet the mutual co-operation of two or more companies and lines of railroad, as common carriers, with each other, in such manner as to hold out, by their manner of doing business, a continuous line of transportation over their roads, each receiving and receipting for property for transportation over such continuous line, and receiving the pay therefor, whether the same be paid in advance, or after rendering the service, at the end of the line, on delivery of such property to the consignee, and apportioning the receipts between themselves, renders each one of such companies liable for the proper carriage over the whole line, or to its nearest destination, of freights so delivered to it to be carried over such continuous line, or over any lesser part thereof; and for loss or breach of duty in that respect, wherever it may occur, the company so receiving the same is liable to an action; and so is the company, if a different one than the one receiving the property for transportation, upon whose

<sup>1</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246.

<sup>2</sup> *Doane v. Russell*, 3 Gray, 382; *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246; *Lickbarrow v. Mason*, 6 East, 21.

<sup>3</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246.

<sup>4</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246.

<sup>5</sup> *Briggs v. Boston & Lowell R. R. Co.*, 6 Allen, 246.

line the loss occurs, at the election of the injured party.<sup>1</sup> The action, in such case, lies not only against the corporate company itself, if operating its line or lines under its own management, but in like manner may be maintained against whomsoever is in the possession of and is operating such line or lines of road, whether it be a lessee, trustee, or receiver, controlling the franchise and taking the tolls thereof. Though if the same be in the hands of a receiver appointed by a court, it is also competent, in case of loss or injury, to apply for, and obtain relief from, the court so placing the franchise in the hands of the receiver, and the court has full power to afford the same.<sup>2</sup>

In *Barter & Co. v. Wheeler et al.*, here cited, the Supreme Court of New Hampshire say: "The case of *Sprague v. Smith*, 29 Vt. 421, is an explicit authority that an action of this kind can be sustained against trustees in possession and actually operating a railroad, and upon principle we think it is clearly so. The trustees are in possession and have the legal title; they appear to the public as the proprietors, and they alone receive and control the income of the railroad, out of which indemnity for losses is to be had."

And so the action will lie singly against the company operat-

<sup>1</sup> *Nashua Lock Co. v. The Worcester & Nashua R. R. Co.*, 48 N. H. 339; *Barter & Co. v. Wheeler* and others, 49 N. H. 9; S. C. 6 Am. R. 434; *Blumenthal v. Brainerd* and others, 38 Vt. 402; *Bostwick v. Champion* and others, 11 Wend. 575; *Bradford v. South Car. R. R. Co.*, 7 Rich. (S. C.), 201; *Cincinnati, Hamilton & Dayton, and Dayton & Mich. R. R. Co., v. Pontius & Richmond*, 19 Ohio St. 221; *Phillips v. N. Car. R. R. Co.*, 78 N. Car. 294, 16 Am. Ry. Rep. 206. Since the decision of the case of *Bostwick v. Champion*, above cited, the legislature of New York, in 1847, passed an act to the same effect, and giving the different lines recourse over against each other for losses paid on their account. And in the case of *Cin., H. & D. R. R. Co. v. Pontius*, above

cited, it is ruled that a contract is void, as against the policy of the law, as to any stipulation for exemption from loss on other lines of the continuous route than the line of the company receiving the property for carriage; and that the liability is absolute throughout the entire route: 19 Ohio St. 221.

<sup>2</sup> *Barter & Co. v. Wheeler*, 49 N. H. 9; *Sprague v. Smith*, 29 Vt. 421; *Blumenthal v. Brainerd* and others, 38 Vt. 402; *Meara's admr. v. Holbrook & Roosevelt, receivers*, 20 Ohio St. R. 137; S. C. 5 Am. R. 633; *Parker v. Browning*, 8 Paige, 388; *Paige v. Smith*, 99 Mass. 395.

<sup>3</sup> *Barter & Co. v. Wheeler* and others, 49 N. H. 9; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

ing the particular line of the road on which the loss occurs, although it be an intermediate line of such continuous line or route so united for purposes of transportation; and the law of the state wherein the loss occurs is the measure of the rights of the parties to such action.<sup>1</sup>

And so if a continuous line be formed of several distinct but connecting roads, and through trains run thereon under one control, an action lies for losses or injuries incurred thereon, against either of the company owners of either of the roads thus composing the continuous line.<sup>2</sup> But the mere fact that the lines are continuous, and that a third person, a forwarding company, is engaged in shipping freight over the roads, using its own cars, and giving through bills of lading, and distributing the freight earned by it among the companies actually engaging in the carriage, proportionately, is not evidence of a partnership between the roads, or that the shipping association acted as the agent of the railroad companies.<sup>3</sup>

**12. When liable for delay, and rule of damages.**—When a common carrier, from mere negligence, fails, beyond a reasonable time, to transport merchandise, and its market value at the place to which it is consigned in the meantime falls, the true rule of damages is the difference in its value at the time and place when and where it should have been delivered, and the time of actual delivery. This rule, it has been well said, “is simple, and though it may sometimes operate harshly, is easily applied.” And in the absence of any special agreement, the law implies that the carrier agrees to transport in a reasonable time.<sup>4</sup>

<sup>1</sup> *Barter & Co. v. Wheeler and others*, 49 N. H. 9; S. C. 6 Am. R. 434.

<sup>2</sup> *Hart v. The Rensselaer & Saratoga R. R. Co.*, 8 N. Y. (4 Selden), 37.

<sup>3</sup> *Watkins v. Terre Haute & I. R. R. Co.*, 8 Mo. App. 569, 570; S. C. 1 Am. & Eng. R. R. Cas. 614.

<sup>4</sup> *Ward v. N. York Cent. R. R. Co.*, 47 N. Y. 29; S. C. 7 Am. R. 405; *Condict v. Grand Trunk R. W. Co.*, 54 N. Y. 500; *Weston and others v. Grand Trunk R. W. Co.*, 54 Maine, 376; *Ingledeu v. Northern R. R. Co.*,

7 Gray, 88; *King v. Woodbridge*, 34 Vt. 565; *Sangamon & Morgan R. R. Co. v. Henry*, 14 Ill. 156; *Galena & Chi. Union R. R. Co. v. Rae*, 18 Ill. 488; *Sisson v. Cleveland & Toledo R. R. Co.*, 14 Mich. 489; *Faulkner and others v. South Pacific R. R. Co.*, 51 Mo. 311; *Peet v. The Chicago & N. Western Ry. Co.*, 20 Wis. 594; *Nettles v. The So. Car. R. R. Co.*, 7 Rich. 190; *Devereux v. Buckley*, 34 Ohio St. 16, 21 Am. Ry. Rep. 72. Such seems to be the rule, too, in England: *Wilson v. Lancashire &*

But to hold the carrier to such liability for mere delay in carriage, the proof of negligence must be clear; for in the absence of negligence on his part, the carrier is not liable for not delivering within the ordinary time of making the passage. Storms, freshets and other unavoidable occurrences, as also a greater throng of business than ordinary, may put it out of his power to carry within the time ordinarily required when no such obstacles present themselves.<sup>1</sup> In the face of such extraordi-

Yorkshire R. W. Co., 9 Com. B. (N. S.), 632. In the case cited here from 54 Maine, *Weston and others v. Grand Trunk R. W. Co.*, the court say, APPLETON, C. J.: "Upon a careful examination, we think the weight of authority is decidedly adverse to the rule, as claimed by the learned counsel for the defendants, and that the decline in the market value of an article, between the time when it actually arrived at its place of destination, and when, in the exercise of proper diligence on the part of the carrier, it might have arrived there, was a material element proper for the consideration of the jury in ascertaining the actual damages sustained by the plaintiff." 54 Maine, 379. But it must be borne in mind that, in the case here referred to, no accident or natural obstacles were in the way of timely delivery; but it was a sheer case of unaccounted for delay or negligence on the part of defendant.

<sup>1</sup> *Ward v. The New York Cent. R. Co.*, 47 N. Y. 29, 7 Am. R. 405, 409; *Faulkner and others v. South Pacific R. R. Co.*, 51 Mo. 311; *Helliwell v. Grand Trunk Ry. Co.*, 10 Biss. 170; S. C. 7 Fed. Repr. 68, 1 Am. & Eng. R. R. Cas. 615, 616; *Nashville & Chattanooga R. R. Co. v. Jackson*, 6 Heisk. 271, 12 Am. Ry. Rep. 54. If the goods be in part lost, the owner is bound to receive the remainder. He can not abandon, as in cases of insurance, and claim full pay for all; he is

only entitled to pay for what is lost: *Shaw & Austin v. The South Car. R. Co.*, 5 Rich. 462; *Nettles v. The South Car. R. R. Co.*, 7 Rich. 190. A "strike" will be no excuse for non-delivery: *Read v. St. Louis, Kansas City & Northern R. R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201. But the lawless, irresistible violence of men not in the employ of the company will be: *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Hazen*, 84 Ill. 36, 16 Am. Ry. Rep. 422. And this, though they may have been just discharged by the company: *Ibid.* Where there is delay by the defendant, and other delay not chargeable to him, the damage sustained by plaintiff must be connected with, and result from, the delay of the defendant: *Detroit & Bay City Ry. Co. v. McKenzie*, 43 Mich. 609; S. C. 5 N. W. Repr. 1031, 21 Am. Ry. Rep. 157. Where a shipper obtained cars upon a promise to unload them, which he failed to do, the company was held not liable for damages resulting from delay: *Cobb v. Ills. Cent. R. R. Co.*, 88 Ill. 394, 21 Am. Ry. Rep. 317. If, at the time the contract of shipment is made, there is already an accumulation of business, known to the carrier, he is liable: *Helliwell v. Grand Trunk Ry. Co.*, *supra*. In such case, the carrier should inform the shipper thereof, so as to allow him to ship by another line if he wishes: *Ibid.*

nary obstacles, what would ordinarily be a reasonable time is no longer such, but on the contrary the time necessary, in the face of such difficulties, becomes in such cases the reasonable time.

Under an ordinary contract of affreightment, not involving an agreement to carry and deliver in a specified time, the company is not chargeable for such delays as are not attributable to its fault.<sup>1</sup> And though there be, as in New York, a statute requiring the regular running of trains, and affording sufficient transportation to persons and property offered for carriage within a reasonable time, yet the company are not bound to be always ready to dispatch or transport all that is offered, immediately on arrival at its station; they are entitled to a reasonable time to meet sudden and unexpected accumulations of freight, beyond its capacity to carry with safety, and are not liable for delay caused by such unusual demands.<sup>2</sup>

<sup>1</sup> In case of entire failure to deliver on the part of the carrier, when such failure is not occasioned by the act of God or the public enemy, or inherent defect in the article to be carried, or insufficient packing or preparing for shipment, or other cause traceable to the fault of the consignor, the rule of damages is the value of the property, or market price, at the place and time of delivery contemplated by the contract; and if no specific time be agreed upon, then a reasonable time is the rule.<sup>3</sup>

For injuries to the property during its transit, or while in the custody of the carrier for the purpose of being carried, the damages are to be adjusted and measured by the difference between the value of the property when thus injured, and the market price of the article, in sound condition, at the time and place contemplated for delivery. If no time be stipulated, then a reasonable time for transportation, under all the circumstances,

<sup>1</sup> *Wibert and another v. The New York & Erie R. R. Co.*, 12 N. Y. 245.

<sup>2</sup> *Wibert and another v. The New York & Erie R. R. Co.*, 12 N. Y. (2 Kernan), 245. The usual time of transit being a fact peculiarly within the knowledge of the carrier, slight evidence thereof on the part of shippers is sufficient; therefore, the testimony of a witness which is derived by hearsay from a clerk in a freight

office, is competent: *Newell v. Smith*, 49 Vt. 255, 17 Am. Ry. Rep. 100.

<sup>3</sup> *Bracket v. McNair*, 14 John. 170; *Sands v. Lilienthal*, 46 N. Y. 541; *Ward v. The New York Cent. R. R. Co.*, 47 N. Y. 29; S. C. 7 Am. R. 405, 407; *Illinois Cent. R. R. Co. v. McClellan*, 54 Ill. 58; S. C. 5 Am. R. 83; *Tucker v. Pacific R. R. Co.*, 50 Mo. 385; *Faulkner v. South Pacific R. R. Co.*, 51 Mo. 311.

is to be allowed in ascertaining the day on which to refer to the market price.<sup>1</sup>

**13. Injury to goods during transit—rule of damages.**—In an action against a railroad company simply for injury to property confided to it, to be by it carried as common carrier, the measure of damages is, as a general rule, the difference between the fair market value of the property in the condition in which it is delivered to the consignee, and what its fair market value would have been if then and there delivered in an uninjured condition.<sup>2</sup> But to this rule there are exceptions, one of which is, that if the merchandise is totally unsalable, so as to have no market value when delivered, because of such injury, and yet by means of slight care or expense it may be again made marketable, then its market value when so restored to a marketable condition, less the labor, care and expense of restoring it, is to be taken and contrasted with what the marketable value would have been if delivered in an uninjured condition, and the difference is the measure of damages in such cases.<sup>3</sup>

**14. Loss of goods—Failure to carry—Rule of damages.**—In case of loss or destruction of the goods received to be carried, if the loss be not occasioned by the act of God or the public enemy, the rule of damages is the value of the goods at the place to which they were to be carried, at the price they were there worth, at the time when, by reasonable diligence, they should have arrived there, less the cost of carriage, if transportation be not prepaid.<sup>4</sup>

Where the measure or manner of recovery is defined by the bill of lading, no parol explanation, or evidence of the course of dealing between the parties, is admissible to affect its terms.<sup>5</sup>

<sup>1</sup> *Ward v. The New York Cent. R. R. Co.*, 47 N. Y. 29; S. C. 7 Am. R. 405, 407; *Bracket v. McNair*, 14 John. 170.

<sup>2</sup> *Winne v. Ill. Cent. R. R. Co.*, 31 Iowa, 583.

<sup>3</sup> *Winne v. Ill. Cent. R. R. Co.*, 31 Iowa, 583.

<sup>4</sup> *Perkins v. The Portland, Saco & Portsmouth R. R. Co.*, 47 Maine, 573; *Brown v. Camden & Atlantic R. R. Co.*, 83 Penn. St. 316, 15 Am. Ry.

Rep. 421. A contract made in Philadelphia, to carry across the Delaware river and through New Jersey, is not a contract to be performed in part in two states, as the inhabitants of both Pennsylvania and New Jersey have equal rights of navigation and passage over that river: *Brown v. C. & A. R. R. Co.*, *supra*.

<sup>5</sup> *McCoy v. Erie & Western Transp. Co.*, 42 Md. 498, 14 Am. Ry. Rep. 317.

**15. Delivery of goods to wrong person—Liability for.**—Common carriers of every kind are equally responsible for goods carried and delivered to the wrong person. It is their duty to know to whom goods are delivered; and from the obligations arising out of this duty, no custom or habit of delivery to the contrary will excuse them. It is as much a duty to deliver rightly as to carry rightly; and for a wrong in either case they are responsible. Thus, the delivery of goods to the mere employe of a truckman, upon the mere statement that the consignee has sent for them, will not relieve the company if the statement be untrue. And where goods are consigned to a fictitious person, though fraudulent impositions be practiced upon the consignor by one who afterward, assuming such fictitious name, obtains the goods of the company after carriage thereof, upon the supposition that he is the real owner or consignee, the company in such case are responsible for their value. It is their duty to ascertain the identity and real character of the person applying for the goods as consignee, if not already known to the company.<sup>1</sup> If the real consignee does not apply for the goods when they have arrived at their place of destination, or if there be no real consignee, the consignee being, as in this case, a fictitious person, then it is the duty of the company to hold the goods subject to the order of the consignor, if known, and to notify him of the condition which affairs have assumed. True, the duty of ascertaining the fictitious character of the consignee may not be imposed upon the company; but it is their duty to know, with such reasonable certainty as will discharge them by delivering to him, that the person applying and claiming to be consignee is such—that is, that the person applying is of the identical name, and sufficiently known as such, with the name of the consignee on the goods and in the way-bill. To our mind, to deliver without such knowledge is as reckless as would be the payment of a bill or draft by a banker, without identification of the person presenting the same for payment. The one pays, and the other delivers, equally at his own risk. In short, it is the duty and the right of the carrier to know to whom goods are delivered.<sup>2</sup>

<sup>1</sup> Winslow *v.* Vermont & Mass. R. Co., 42 Vt. 700; S. C. 1 Am. R. 365; *Guillaume v. Hamburg* & American Packet Co., 42 N. Y. 212; S. C. 1 Am. R. 512.

<sup>2</sup> *Guillaume and others v. Hamburg*



So, where goods are fraudulently ordered per mail, in the name of a fictitious person, and on their arrival are called for and received by the person perpetrating the fraud, he representing himself as the consignee, the company, by delivery to such person, are responsible to the vendor or shipper for the value of the goods. The carrier should require identification of the pretended owner or consignee, if responsibility would be avoided.<sup>1</sup> It is not always enough that a duplicate of the bill of lading be presented; there should be identification of its holder.

The delivery of goods by a common carrier to the wrong person, is a conversion of the goods, and therefore the carrier is liable.<sup>2</sup>

The delivery of the goods to the wrong person is not a "loss" of the goods, within the meaning of a provision in the bill of lading, limiting the liability of the railroad company, in case of loss, to the value of the goods at the time and place of shipment. In such case, therefore, the railroad company may not avail themselves of this provision.<sup>3</sup> After delivering goods to the wrong person, and receiving payment of the freight thereon, the company can not maintain replevin for them; by the delivery and payment the lien of the company is lost.<sup>4</sup>

**16. Blank receipt—Effect of, for goods to carry.**—It is holden in Vermont, that a receipt of a railroad company for goods marked for a point beyond the terminus of its line, the receipt containing the words "which the company promises to forward by its railroad, and deliver to \_\_\_\_\_, or order, at its depot in \_\_\_\_\_, he or they first paying freight for the same," binds the company to carry all the way through to the place of destination marked upon the goods, and that such company are liable if loss occurs, irrespective of the line of road or place whereon or where the loss is incurred; that while not undertaking to decide the question whether the mere receiving

& Am. Packet Co., 42 N. Y. 212; S. C. 1 Am. R. 512.

<sup>1</sup> Price v. The Oswego & Syracuse R. W. Co., 50 N. Y. (5 Sickels), 213; Winslow v. The Vermont & Mass. R. Co., 42 Vt. 700; Duff v. Budd, 3 Brod. & Bing. 177; S. C. 7 Eng. Com. Law, 671.

<sup>2</sup> Claflin and another v. Boston &

Lowell R. R. Co., 7 Allen, 341.

<sup>3</sup> Baltimore & Ohio R. R. Co. v. McWhinney, 36 Ind. 436, 5 Am. Ry. Rep. 312. In such an action, the plaintiff is entitled to open and close the case: *Ibid.*

<sup>4</sup> Lake Shore & Mich. Southern Ry. Co. v. Ellsey, 85 Penn. St. 283, 18 Am. Ry. Rep. 413.

and receipting for goods to carry, which are marked for a point beyond the line of a company, will bind it to carry to such point, the court were of opinion that such receipting in blank, as to the point of destination, with the words of promise contained in the receipt, amounted to an undertaking to carry all the way through.<sup>1</sup>

**17. Not liable for money on the person of a passenger.**—For money carried on the person of a passenger, not servient to the necessities of his journey, as reasonably required for the expenses thereof, but carried merely for the purpose of transportation, a railroad company is not liable if lost, although the loss occur through the negligence of the company. While the principle is recognized that, in consideration of the money paid for the passenger's fare, the company is bound to the utmost degree of diligence and care in transporting its passengers, and that such contract as to his person necessarily includes the wearing apparel thereon, and such reasonable sum of money as may be in good faith carried upon his person for the expenses of his journey, with such articles, to a reasonable extent, as are ordinarily carried or worn upon the person for use, convenience, or ornament, as also for his baggage, delivered as such to the company to be carried, and properly checked, yet neither this extraordinary care, nor any other degree of care or charge, extends to money carried about the person or luggage of passengers for mere business purposes, or for the purpose of transporting it from one place to another. There can be no doubt about the right of a passenger to so carry about his person, for the mere purpose of transportation, large or small parcels of money, without informing the carrier thereof, or paying anything for such privilege or transportation; but this right does not arise from a consideration received by the company, and if so carried by the passenger, he does so at his own risk, so far as the acts of third persons are concerned, or even mere negligence of the company or its servants. For this secret mode of transportation would be a fraud on the carrier, were the carrier to be held responsible therefor. It would impose liability without a consideration; and not only so, but for that for which its better care be not allowed to be exercised, as not being in any manner placed in the custody of the company.<sup>2</sup> The case here

<sup>1</sup> *Cutts v. Brainerd*, 42 Vt. 566; S. C. 1 Am. R. 353.

*v. The Marietta & Cin. R. R. Co.*, 20 Ohio St. R. 259; S. C. 5 Am. R. 655.

<sup>2</sup> *First National Bank of Greenfield*

cited from 20 Ohio State was one where an agent of the plaintiff was sent to carry a package of money, on his person, in legal tender bills, from Greenfield to Cincinnati, upon the railroad of the defendant, as an ordinary passenger thereon. In the course of the passage an accident happened to the train, by which the agent, together with the money and clothing upon his person, were burned and destroyed; and although the accident was the result of negligence of the railroad company, it was holden that liability therefor extended only to loss resulting to that which the company were engaged to carry, and not to money thus carried, to more than a reasonable amount for expenses, upon the person of the passenger. The court say, the notes "remained in the exclusive custody and control of" the passenger. "And as they were clearly not included in the contract for the transportation of the passenger and his baggage, and were not subjected to the custody of the carrier, it is difficult to see how he can be held liable for a want of care over them."

**18. Mandamus lies to compel receipt and carriage of goods.**

—A mandamus will be awarded to enforce the carrying and delivery of freights at elevators, or places on switches or branches of a company's road, owned and used in common with another road, or other roads, on which such company is accustomed to deliver freights at other depots, elevators, or places of reception.<sup>1</sup> Railroad companies, being common carriers, are bound to carry and deliver for all persons alike, at such places on their line, or on switches ordinarily used by them, as the shippers themselves may designate, and are not allowed, in such transactions, to discriminate in favor of certain elevators or places for the reception of freight; and, moreover, the fact that a company has contracted with certain ones to deliver exclusively to them, will not alter the case, or justify a refusal to deliver at others, as to consignors who are not party to such agreement.<sup>2</sup>

But a writ of mandamus will not be awarded against a railroad corporation, to compel the delivery of freight at a point not upon the line of its own road, although on the line of a connect-

<sup>1</sup> Chi. & N. Western Ry. Co. v. The People, *ex rel.* of Hempstead, 56 Ill. 365.

<sup>2</sup> Vincent and others v. The Chi. & Alton R. R. Co., 49 Ill. 33; The

People, *ex rel.* Hempstead, v. The Chi. & Alton R. R. Co., 55 Ill. 95; Chi. & N. Western Ry. Co. v. The People, *ex rel.* of Hempstead, 56 Ill. 365.

ing road.<sup>1</sup> The party applying for such writ must not only show a clear right to have the thing done, which is sought to be enforced, but also in the manner, and by the party or body, sought to be coerced. The party of which the duty act is required must also have a right to perform it.<sup>2</sup> To enforce the delivery on the line of a connecting road at a place different than from the point of connection, would infringe the rights of the company owning the connecting road, and would involve a trespass upon their chartered limits, unless entered upon by their consent. In the case cited from 55 Illinois, the Supreme Court of that state say: "To compel a railroad company to receive and deliver freight at points off and beyond their own line, would be not only oppressive and involve their business in inextricable confusion, but would impose burdens and responsibilities upon them which they never contracted to assume." That the track or tracks required to be used, to comply with the writ, if granted, belong to another and different company; and that should the writ be awarded, the court very pertinently ask, "how could respondents obey it? Could they, without the permission of" the other company, "run their cars over their tracks?" "Could the writ command them to purchase the right" so to do? It is clear that the writ of mandamus can not be made to perform such an office.<sup>3</sup>

But it does not follow absolutely, from such duty, that a railroad company having a wharf at its terminus, is bound in like manner to extend the privileges, benefits or use thereof, to all of its customers or persons transporting property over its road alike. In this respect it may consult its own interest and convenience; more especially if such wharf accommodation be not sufficiently extensive to meet the necessities of all those doing a shipping business over the road of the company. As in such case some one or more must necessarily be excluded, it remains for the company itself to elect as to who shall be admitted to its privileges, and who not.<sup>4</sup>

<sup>1</sup>The People, *ex rel.* Hempstead, *v.* The Chi. & Alton R. R. Co., 55 Ill. 95; S. C. 8 Am. R. 631.

<sup>2</sup>The People *ex rel.* *v.* Hatch, and the Same *v.* Dubois, 33 Ill. 9; The People, *ex rel.* Hempstead, *v.* Chi. & Alton R. R. Co., 55 Ill. 95; Same

case, 8 Am. R. 631.

<sup>3</sup>The People, *ex rel.* Hempstead, *v.* The Chi. & Alton R. R. Co., 55 Ill. 95, 109; S. C. 8 Am. R. 631.

<sup>4</sup>Audenried *v.* Phil. & Reading R. R. Co., 68 Penn. St. 370; S. C. 8 Am. R. 195.

19. **When carrier's liability begins.**—A contract with a common carrier for the carriage of goods, is a contract of bailment, and it is necessary, in order to charge the carrier with their loss, that the property to be carried be actually delivered in proper condition to such carrier, and accepted by him for carriage. The articles are to be put up and marked by the shipper for carriage with suitable care, according to their character or liability to injury, and their destination or place of delivery by the carrier, and the name of the consignee, plainly shown.<sup>1</sup>

The liability of a railroad company, as common carrier, for goods delivered to it, does not begin until the arrangements for transportation, as between the owner or consignor and the company, are so complete that the duty of immediate transportation devolves upon the company. So long as any thing further is to be done, or orders given by the owner, to enable the company to perform its duty as carrier with certainty as to what it is, or any thing else is required of the owner, the relation of carrier is not created by leaving the goods with the company. They are, during such time, bailees of a different character than as carriers.<sup>2</sup>

To charge a railroad corporation, as warehousemen, with the loss of goods deposited in its depot, it is not sufficient to show that the goods are stolen or are lost; there must be some evidence of negligence or want of ordinary care on the part of the company, or of some wrong or dereliction of duty on its part. Under such circumstances, the company is liable only as a

<sup>1</sup>Merriam v. The Hartford & New Haven R. R. Co., 20 Conn. 354; S. C. 2 Am. R. W. Cases, 135; Grosvenor v. New York Cent. R. R. Co., 39 N. Y. (12 Tiffany), 34. But the delivery to the agent of the company at a place away from the line of the railroad, and distant from the usual place of receiving goods for transportation, will not bind the company, unless by their consent and special agreement thereto: Mo. Coal & Oil Co. v. Hannibal & St. Jos. R. R. Co., 35 Mo. 84. And where goods are shipped by water, *via* the railroad company from some intermediate point, and the goods are

received by the railroad company with knowledge of these facts, the possession of the goods is *prima facie* a possession as carriers: Rogers v. Wheeler, 52 N. Y. 262, 4 Am. Ry. Rep. 411.

<sup>2</sup>Barron v. Eldredge, 100 Mass. 455; Rogers v. Wheeler, 52 N. Y. 262, 4 Am. Ry. Rep. 411. And see Watts v. Boston & Lowell R. R. Co., 106 Mass. 466, 8 Am. Ry. Rep. 50; O'Neill v. N. Y. Central & Hudson River R. R. Co., 60 N. Y. 138, 10 Am. Ry. Rep. 121; Sumner v. Charlotte, Columbia & Augusta R. R. Co., 78 N. Car. 289, 16 Am. Ry. Rep. 201.

depository, and can not be held liable, except for negligence, as to the want of ordinary care of the goods; and the *onus* as to negligence is on the plaintiff.<sup>1</sup>

The general rule is, that to charge the carrier, the property must be delivered to him or it, or to his or its servants authorized to receive it; and therefore, if it be merely deposited in some place to which the carrier resorts, or be deposited in his cart or vehicle for carriage, without the knowledge and acceptance of the carrier, or his or its servants or agents authorized to receive it, there is no bailment or delivery of the property, and consequently no responsibility attaches to the carrier therefor.<sup>2</sup> But there are exceptions to this rule, so far as the same may be affected by conventional arrangements existing between the parties as to the mode of delivery; and the rule prevails only where there is no such arrangement. It is competent for the parties to make such agreement in that respect as is to them acceptable, and when made, the agreement, and not the general law, will govern their rights and liabilities. Therefore if it be agreed that property to be carried shall be deposited for transportation at a particular place, and without any express notice thereof to the carrier, then such deposit will be a sufficient delivery to charge the carrier; for in such cases, the depositing of the property at the place agreed on for carriage, without requiring express notice, will amount to notice by implication of law.<sup>3</sup>

And so a settled usage or habit of a carrier to receive property at a particular dock or place for carriage, and without any special notice of such deposit, is sufficient to show a public offer by the carrier to receive property in that manner for carriage; and a delivery of property there, accordingly, and to be carried in pursuance of such offer, will be sufficient to charge the carrier, under an implied agreement between the parties that the property, if thus deposited, shall be delivered to the carrier for

<sup>1</sup>Thomas v. Boston & Providence R. R. Co., 10 Met. 472; Lamb v. Western R. R. Co., 7 Allen, 98. Where there is an entire failure of evidence, the court will so rule, and direct a verdict for defendant: *Ib.*

<sup>2</sup>Merriam v. Hartford & N. Haven

R. R. Co., 20 Conn. 354, 360; S. C. 2 Am. R. W. Cas. 135; Grosvenor v. The New York Cent. R. R. Co., 39 N. Y. (12 Tiffany), 34.

<sup>3</sup>Merriam v. Hartford & N. Haven R. R. Co., 20 Conn. 354, 360, 361; S. C. 2 Am. R. W. Cas. 135.

carriage, and without any further notice thereof.<sup>1</sup> Thus, a delivery of freights to a railroad company for shipment, made by placing the same in a car of the company, left by the company for that purpose on the side track of the railroad at the shipper's place of business, and notice thereof to the company, is a sufficient act of delivery to bind the company, as carriers, for the safety of the goods from the time of such notice; and a loss by fire thereafter is the loss of the company, although the bill of lading or receipt for the property had not yet been delivered to the shipper.<sup>2</sup> From the time of placing the property aboard the car, the company, as sole owners of the side track, could alone control it, and their possession was therefore held to be complete and exclusive.<sup>3</sup> In such case, the liability of the company can not be limited by proof showing the usage to be to embrace, in all bills of lading for that particular kind of freight, a clause exempting it from losses by fire. Such proof will not avail, as nothing short of a special agreement can have that effect.<sup>4</sup>

But merely leaving off property, desired by the owner to be transported on the cars (as grain, for instance), at the depot, or in and about the warehouse of a railroad company, does not amount to a delivery thereof for carriage by the owner, nor to such a receipt thereof for carriage as will charge the company with loss thereof, without their fault, or with its natural decay, or with damages for not carrying the same; no bill of lading or receipt being given for the same, and there being no act, promise or usage of the company or its agents, by which the acceptance and receipt thereof by the company for transportation can be inferred.<sup>5</sup> And if, in fact, there be an acceptance and receipt thereof for carriage, yet if the railroad of the company be in military occupancy and control, in time of war, so as by superior force of such occupancy and control of the military the railroad company have not the ordinary free means of shipment thereon, then there is no liability on such company for mere failure to

<sup>1</sup> *Merriam v. Hartford & N. Haven R. R. Co.*, 20 Conn. 354, 355.

<sup>2</sup> *Ill. Cent. R. R. Co. v. Smyser*, 38 Ill. 354.

<sup>3</sup> *Ill. Cent. R. R. Co. v. Smyser*, 38 Ill. 354.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Smyser & Co.*, 38 Ill. 354; *Western Trans. Co. v. Newhall*, 24 Ill. 466.

<sup>5</sup> *Ill. Cent. R. R. Co. v. Hornberger*, 77 Ill. 457.

carry, although in the mean time, and without there being any fault on its part as the proximate cause thereof, the property decay or deteriorate.<sup>1</sup>

A delivery of goods to a railroad company, to remain with them in view of future carriage, after something else is to be ascertained, arranged or done, and not for immediate transportation, charges such company only as warehousemen for the time being, and not as common carriers. As, for instance, if goods be delivered to the company by one person, which belong to another, with orders to retain them until directions as to their shipment be received from the designated owner, then until the full order and arrangement for their transportation is made, the liability of the company is only as that of a warehouseman.<sup>2</sup>

And so the ruling is in Massachusetts, that although it is a general rule of the law that the responsibility of a railroad company as a common carrier for goods delivered to it to be carried begins as soon as the goods are delivered to it to be carried, at the proper place and in the proper condition for transportation,<sup>3</sup> yet if the goods, when so delivered, are not ready for immediate transportation, so that something else remains to be done, or further directions as to their carriage are to be given by the owner or consignor, then the goods remain with the carrier in the mean time as a mere warehouseman, and in case of their loss, his liability is to be tested by the rules of law as to warehousemen, and not as to the rules of liability in regard to common carriers.<sup>4</sup>

**20. When carrier's liability ceases.**—There is a diversity of rulings in law as to the termination of the carrier's liability. One class of cases hold, that on the safe arrival of the goods at their place of destination, if it be at an unseasonable hour, or there be no one in attendance authorized to receive them, it is the duty of the company to store them in their depot or warehouse, or in some other warehouse which is generally regarded as safe, to await the convenience of the consignee to take them

<sup>1</sup> Ill. Cent. R. R. Co. v. Hornberger, 77 Ill. 457.

<sup>2</sup> St. Louis, Alton & Terre Haute R. Co. v. Montgomery, 39 Ill. 335; Rogers v. Wheeler, 52 N. Y. 262, 4 Am. Ry. Rep. 411.

<sup>3</sup> Judson v. Western R. R. Co., 4

Allen, 520; White v. Goodrich Transp. Co., 46 Wis. 493, 21 Am. Ry. Rep. 398.

<sup>4</sup> Judson v. Western R. R. Co., 4 Allen, 520; O'Neill v. New York Central & Hudson River R. R. Co., 60 N. Y. 138, 10 Am. Ry. Rep. 121.



away; and when so stored, in good faith, the liability of the railroad company as carriers, in respect to them, ends; and that thereby the liability of warehouseman attaches, in lieu thereof, to those who thus assume warehouse custody of the goods; and the goods become subject to warehouse charges,<sup>1</sup> if there be no custom or contract to the contrary. Another class of cases hold that the responsibility of the company as carrier still continues, notwithstanding the arrival and proper storage of the goods, if the consignee be not there to receive them, until such time as he has notice of their arrival, or until a reasonable time has elapsed for him to ascertain that fact, and to apply for the goods;<sup>2</sup> and according to the latter class of cases, the owner, if notified of the arrival, still has a reasonable time thereafter to apply for and take them away, before the carrier's liability ceases.<sup>3</sup>

<sup>1</sup> *Francis v. The Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60; *Mote v. Chicago & N. W. R. R. Co.*, 27 Iowa, 22; *Story on Bailments*, Sec. 448; *New Albany & Salem R. R. Co. v. Campbell*, 12 Ind. 55; *Bansemmer v. The Toledo & Wabash R. R. Co.*, 25 Ind. 434; *Cincinnati & Chi. Air Line R. R. Co. v. McCool*, 26 Ind. 140; *Jackson v. Sacramento Valley R. R. Co.*, 23 Cal. 268; *Neal v. The Wilmington & Weldon R. R. Co.*, 8 Jones (L.), 482; *Thomas v. The Boston & Prov. R. R. Co.*, 10 Met. 472; S. C. 1 Am. R. W. Cas. 403; *Norway Plains Co. v. Boston & Me. R. R. Co.*, 1 Gray, 263; *Stevens v. The Boston & Me. R. R. Co.*, 1 Gray, 277; *Alabama & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209; *Mobile & Girard Railroad Co. v. Prewitt*, 46 Ala. 63; S. C. 7 Am. R. 586; *Illinois Cent. R. R. Co. v. Alexander and others*, 20 Ill. 23; *Porter v. Chicago & Rock Island R. R. Co.*, 20 Ill. 406; *Richards v. Mich. S. & N. Ind. R. R. Co.*, 20 Ill. 404; *Davis v. Mich. S. & N. Indiana R. R. Co.*, 20 Ill. 412; *Chi. & N. W. Ry. Co. v. Bensley et al.*, 69 Ill. 630; *Moses v. Boston & Maine R. R. Co.*, 32 N. H. 523; *Brown v. Grand Trunk Ry. Co.*, 54 N. H. 535; S. C. 11 Am. Ry. Rep. 195; *McCarty and an-*

*other v. The New York & Erie R. R. Co.*, 30 Penn. St. (6 Casey), 247; *Jeffersonville R. R. Co. v. Cleveland*, 2 Bush, 468; *South Western R. R. Co. v. Felder*, 46 Ga. 433, 11 Am. Ry. Rep. 419.

<sup>2</sup> *Moses v. Boston & Maine R. R. Co.*, 32 N. H. 523; *Blumenthal v. Brainerd*, 38 Vt. 402; *Winslow v. Vermont & Mass. R. R. Co.*, 42 Vt. 700; S. C. 1 Am. R. 365; *Wood v. Crocker*, 18 Wis. 345; *Parker and another v. Mil. & St. Paul Ry. Co.*, 30 Wis. 689; *Lemke v. Chicago, Milwaukee & St. Paul Ry. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406; *Buckley v. The Great Western Ry. Co.*, 18 Mich. (5 Jennison), 121. It is held that from 4 to 6 o'clock is not a reasonable time in which to remove the goods; and if lost in that time, the carrier is liable: *Parker and another v. Mil. & St. Paul Ry. Co.*, *supra*. From 5:30 o'clock p. m. of Saturday, to noon of the following Tuesday, *held* a reasonable time in which to remove goods; and the absence of the consignee from town will not operate to extend the liability as carrier: *Lemke v. C. M. & St. P. Ry. Co.*, *supra*.

<sup>3</sup> *Farmers' & Mechanics' Bank v. The Champlain Transportation Co.*, 23 Vt.

In still another class of rulings, it is holden that the arrival and unloading of the goods onto the platform at the place of destination, at a way station, where there is no warehouse of the company, discharges the carrier of all liability whatever for the goods. But these decisions are comparatively few in number, and are based exclusively upon local custom.<sup>1</sup> To our mind, if to be regarded as authority at all, it must be under similar circumstances of local custom, well substantiated in point of fact, and well understood by the parties to the transaction.

But clearly, without such custom well established, a delivery is not effectual by discharging the articles from the cars, and deposit thereof on the platform. The case of *McMasters v. The Pennsylvania Railroad Company* above cited, involved the delivery of freight at Turtle Creek station, about twelve miles only from Pittsburgh, the latter being the place of shipment. The property was purchased the previous day, and ordered to be forwarded by railroad to that station on the day on which it arrived there; and under the circumstances the consignee would naturally expect its arrival, so that the custom in such case would scarcely work a hardship. Nor would a custom of the kind be likely to, as to shipments from Pittsburgh to the same point, as the consignee would usually know, on so short a line, when to expect his freight to arrive; but on long lines of shipment, the uncertainty of the time of arrival would render such a custom almost impracticable, that requires the consignee to be present to receive his property on its arrival at the station. The inconvenience of this would be so great that it would prevent such a practice ever maturing into a custom having the force of law.

The Supreme Court of Alabama very justly hold, that in contracts for carrying goods, the obligation is not all on the part of

186. If the owner be present, and request the storage of the goods for a short time, instead of taking them away, and they be so stored by the company, then the character of carrier ceases, and that of warehousemen commences. In such case, if the goods be lost, the question of negligence, and the question whether the railroad company is a bailee for reward, or a

gratuitous bailee, are rightfully referred to the jury, if there is any dispute as to the facts in reference thereto: *Dimmick and another v. Mil. & St. Paul Ry. Co.*, 18 Wis. 471.

<sup>1</sup> *McMasters v. The Penn. R. R. Co.*, 69 Penn. St. R. 374; S. C. 8 Am. R. 264; *Farmers' and Mechanics' Bank v. The Champlain Transportation Co.*, 23 Vt. 186.

the carrier; that it is as much a part of the contract that the owner or consignee shall be on hand to receive them on their arrival at the place of destination, or within a reasonable time thereafter, as that the carrier shall transport and safely deliver the same; that if, on arrival, the goods are not called for, and are then deposited in the warehouse of the company, to await the reasonable opportunity of the owner to apply for them, that from and after such warehousing the liability of the carrier, as carrier, is at an end; subsequently the company are liable only as warehousemen for hire.<sup>1</sup> Such keeping is a keeping for hire, in contemplation of law, notwithstanding no other or additional charge be made therefor than the amount paid for carriage. In the language of the Supreme Court of Alabama, "When the railroad company thus undertakes to receive and keep the goods for the owner, it is an assumption of control that can not be treated as a mere bailment without hire. For it can not be in justice said that such a bailment is without hire, though no charges for storage are demanded. The accommodation itself is one that has a strong tendency to bring business to the company, because goods transported by them thus find a safe deposit until they can be removed by the owner. Thus, too, the company is paid for the use of its depots by the increase of its business. And when they assume thus to act as warehousemen for their customers, they must be treated as warehousemen for hire." Such, too, is the weight of authorities.<sup>2</sup>

In the case here cited of the Alabama & Tenn. Rivers R. R. Co. *v.* Kidd, the court, recognizing the general rule upon that subject, say: "If goods, transported by railroad, are not called for by the consignee when they arrive at their destination, and

<sup>1</sup>Alabama & Tenn. Rivers R. R. Co. *v.* Kidd, 35 Ala. 209; Mobile & Girard R. R. Co. *v.* Prewitt, 46 Ala. 63; S. C. 7 Am. R. 586; Chi. & N. W. Ry. Co. *v.* Bensley *et al.*, 69 Ill. 630. But see Jewell *v.* Grand Trunk Ry., 55 N. H. 84, 11 Am. Ry. Rep. 496, holding that carriers are bound to deliver freight at a suitable and reasonable place for the consignee to receive it, even after their liability as common carriers has ceased, and that

of warehousemen attached; but if the consignee accept an insufficient delivery, he can not hold the company liable for loss or injury occurring during their removal thereafter. *Ibid.* And no custom of the company's servants to assist in such removal will affect them. *Ibid.*

<sup>2</sup>Mobile & Girard R. R. Co. *v.* Prewitt, 46 Ala. 63, 68; S. C. 7 Am. R. 586, 590.

are then deposited in the warehouse of the company without additional charge, until the owner or consignee has a reasonable time by the exercise of proper diligence to remove them, the liability of the company, *as a carrier*, is at an end; and if, after this, the goods remain in their warehouse, they are responsible only as keepers for hire." And that in the latter case they are responsible only for losses caused by their want of such care as is required of ordinary bailees for hire.<sup>1</sup> Moreover, that if the company keep no warehouse at the point of destination of the goods on their road, the duty of the company is performed by carrying the goods to such place of destination, and there storing them in an ordinarily safe warehouse, to be kept for the consignee or owner, after first retaining them a reasonable time for the owner or consignee, by the use of diligence, to receive and take them away.<sup>2</sup> The obligation of diligence as to looking after and receiving of the goods on their arrival, is as much the duty of the owner or consignee as it is a duty devolving on the carrier to carry the same with suitable diligence.<sup>3</sup>

And if, after the goods arrive at their proper destination, and are warehoused by the company, they are destroyed by fire without the fault of the company, then the company are not liable for the loss.<sup>4</sup> Such, too, is the law, whether the goods be stored in the ordinary course of proceedings, by reason of not being called for, or by agreement, and for the mutual convenience of the consignee and the company.<sup>5</sup>

<sup>1</sup> 35 Ala. 217. See also, *Norway Plains Co. v. B. & M. R. R. Co.*, 1 Gray, 263; *Thomas v. Boston & P. R. R. Co.*, 10 Met. 472; *Moses v. Boston & M. R. R. Co.*, 32 N. H. 523, cited by the court in *Alabama & Tenn. Rivers R. R. Co. v. Kidd*.

<sup>2</sup> Ala. & Tenn. Rivers R. R. Co. v. Kidd, 35 Ala. 209, 218.

<sup>3</sup> Ala. & Tenn. Rivers R. R. Co. v. Kidd, 35 Ala. 209.

<sup>4</sup> *Francis v. The Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60; *Aldrich v. The Boston & Worcester R. R. Co.*, 100 Mass. 31; S. C. 1 Am. R. 76; *Richards and others v. Mich. S. & N. Indiana R. R. Co.*, 20 Ill. 404; *Roths-*

*child et al. v. Mich. Cent. R. R. Co.*, 69 Ill. 164; *Lemke v. Chicago, Milwaukee & St. Paul Ry. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406.

<sup>5</sup> *Fenner v. The Buffalo & State Line R. R. Co.*, 44 N. Y. 505; S. C. 4 Am. R. 709. And so when a quantity of hay was left on the cars for the accommodation of the owner, after arrival at its destination in good order, and was so left at the owner's request, as thus being more convenient for further shipment by water, and the permission to remain on the cars was given upon condition that it be at the owner's risk, and the hay was lost without fault of the com-

CATON, Chief Justice, lays down the true rule as to the termination of liability as carriers, by warehousing the goods, with great force and clearness in *Illinois Central Railroad Company v. Alexander and others*,<sup>1</sup> in the following terms: "The law is now too well settled to bear discussion, that a railroad company may assume the double character of carriers and warehousemen." And "That their duty as carriers is ended when they have placed the goods in a safe depot of their own, or any other safe warehouse." This, too, irrespective of any notice to the owner; he should be on hand to receive them.<sup>2</sup>

And WALKER, Justice, of the same court, disposes of the subject and asserts the true principle in the following language: "This court has held, at the present term, in the case of *Porter v. The Chicago & Rock Island Railroad*, that to terminate its liability as a common carrier, it is not necessary that a railroad should give notice of the arrival of goods to the owner and consignee. And that so soon as the goods arrive at their destination, or at the terminus of their road, and they are unloaded and placed safely and securely in the defendant's warehouse, that the responsibility of common carriers ceases, and that of warehousemen attaches."<sup>3</sup>

Such, also, is the ruling in the state of Iowa, where it is held, accordingly, that a railroad company, sued and declared against as warehousemen, can not be charged with the liabilities of common carriers; and that the responsibilities of the two characters are not the same. When, therefore, in an action for loss of goods delivered to be transported, the goods were, by the plaintiff's own showing in his petition, actually carried as required to the place of destination, but were there lost after being warehoused, a charge to the jury holding the company liable except as for loss by the act of God or the public enemy—a superior power, or *vis major*—as in case of common carriers, is erroneous. The goods having arrived at the place of their destination in good order, and not being called for in a reason-

pany, the railroad company was held not to be liable: *Knowles v. Atlantic & St. Lawrence R. R. Co.*, 38 Maine, 55.

<sup>1</sup> 20 Ill. 23, 29.

<sup>2</sup> *Alabama & Tenn. Rivers R. R. Co. v. Kidd*, 35 Ala. 209; *Mobile & Girard*

*R. R. Co. v. Prewitt*, 46 Ala. 63; S. C. 7 Am. R. 586.

<sup>3</sup> *Richards and others v. Mich. S. & N. Indiana R. R. Co.*, 20 Ill. 404, 406, 407; *Porter v. The Chicago & Rock Island R. R. Co.*, 20 Ill. 407.

able time, were then stored in the company's warehouse, and lost. The responsibility of common carrier had ceased, and the company were no longer liable except as warehousemen, which is, for ordinary diligence.<sup>1</sup>

The proper delivery of the goods, however, to the consignee or his order, terminates the liability of the company, whether that liability be as carriers or as warehousemen;<sup>2</sup> and a servant of the company whose business is that of a freight-house laborer, to load and unload cars and deliver freight, is a competent witness to prove the delivery.<sup>3</sup> In *Draper v. The Worcester & Norwich Railroad Company*, here cited, the court say there is a "well established exception to the general rule," which exception "admits agents, factors, brokers, carriers, and subordinate agents and servants in all departments of business, to testify, as competent witnesses, to the receipt and payment of money, the delivery of goods, and all acts usually done by such classes of persons, within the scope of their ordinary occupation and employment."<sup>4</sup>

To constitute a delivery, it is not absolutely necessary that there be a landing of the goods on the platform, and a formal delivery therefrom to the consignee, or else a storage of the goods in the company's warehouse, to await the application of the consignee, if not delivered at the platform, nor a subsequent formal delivery thereat, and removal therefrom; but any act or circumstance done or caused to be done at the instance of the consignee, which transfers the superior control and possession of the property from the agents or servants of the company to that of the consignee or his agents or servants, will amount in law to a delivery, so as to discharge the company from liability for injuries happening to the goods, or losses occurring after such change of authority.<sup>5</sup> Thus while it is the general duty

<sup>1</sup>*Porter v. The Chicago & N. W. Ry. Co.*, 20 Iowa, 73.

<sup>2</sup>*Draper v. The Worcester & Norwich R. R. Co.*, 11 Met. 505, 1 Am. R. W. Cases, 607; *Lewis v. The Western R. R. Co.*, 11 Met. 509; S. C. 1 Am. R. W. Cas, 610, 615. And in the absence of proof to the contrary, the presumption will be indulged that goods are ready for delivery at

any time after their receipt: *Lemke v. Chicago, Milwaukee & St. Paul Ry. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406.

<sup>3</sup>*Draper v. The Worcester & Norwich R. R. Co.*, 11 Met. 505.

<sup>4</sup>1 Am. R. W. Cases, 609.

<sup>5</sup>*Lewis v. The Western R. R. Co.*, 11 Met. 509, 1 Am. R. W. Cas. 610.

of a railroad company to deliver the goods at their depot or warehouse, as the case may be, yet it is holden that where, at the special request of the consignee, or of his agent to receive the goods, the car containing the property was hauled from the depot of the carrier to the depot of another railroad hard by, that from the time it left the depot of the carrier for the other depot, the property was constructively in the possession of the consignee, and that injury thereto in the removal of the same from the car, occasioned by the use of the derrick or other facilities of such other road, or by persons other than the employes of the carrier, then the persons and means thus employed are to be considered as the instruments, agents and agencies of the consignee, and the carriers are in no manner responsible for the result.<sup>1</sup>

And so in Minnesota the ruling is, that if the goods have arrived at their destination, the carriers may store them, and become but warehousemen in relation thereto, if not called for in a reasonable time.<sup>2</sup> By the ruling in some states, if the consignee resides at such place of final destination, reasonable notice of the arrival of the goods is to be given by the company, before it may thus change its relation of carrier into that of warehouseman;<sup>3</sup> but until the goods arrive at the place of their final destination, no other obligation as to notice or delivery devolves in law on the company in charge of them, but to forward safely and with diligence, and deliver to the connecting line at the end of their route.<sup>4</sup>

The rulings in New York seem to favor the necessity of notice to the consignee; there the liability of a common carrier ceases, it has been said, after the arrival of the goods at their destination, and notice thereof to the consignee, and the lapse of a reasonable time in which to receive and carry them away. What is a reasonable time, if there are conflicting facts, is a

<sup>1</sup> *Lewis v. The Western R. R. Co.*, 11 Met. 509.

<sup>2</sup> *Derosia v. The Winona & St. P. R. R. Co.*, 18 Minn. 133.

<sup>3</sup> *Irish v. The Milwaukee & St. Paul Ry. Co.*, 19 Minn. 376; *Pinney v.*

*First Div. of St. Paul & Pac. R. R. Co.*, 19 Minn. 251; *Baltimore & Ohio R. R. Co. v. Morehead*, 5 West Va. 293.

<sup>4</sup> *Irish v. The Milwaukee & St. Paul Ry. Co.*, 19 Minn. 376.

question for the jury;<sup>1</sup> but if the facts are undisputed, it is then a question for the court.<sup>2</sup>

After notice of their arrival, it is the duty of the owner or consignee to receive and remove them in all reasonable hours at once, and any delay in that respect will be counted part of what would be a reasonable time.<sup>3</sup> He can not defer the receiving and removal of the goods until he attends to other business or interests of his own; to allow this, would be to prolong the liability of the company, as common carriers occupying the position of insurers, for the mere convenience of the consignee, and without consideration, and thus impose upon the carrier the continued risk. It is the duty of the carrier to give notice of the arrival, and of the consignee to then act upon the notice, and remove the goods at once.<sup>4</sup> If he acts otherwise, it is at his own risk.<sup>5</sup>

But if the residence of the consignee is unknown to the carrier, and is not ascertained on reasonable inquiry, this excuses the necessity of notice, if in law one is required.<sup>6</sup> Consignees should make known their residence and means of obtaining notice to the carrier, when they are expecting the arrival of consignments;<sup>7</sup> but whether, when such notice is given, or the residence be otherwise known, it is incumbent on the company to give a notice when the residence of the consignee is out of the place whereat the goods arrive—*quære?*<sup>8</sup> But allowing notice in any case to be necessary, yet where the goods arrive on Sunday, and are stored in a warehouse, and burned before a reasonable time, next day, to serve notice, no liability attaches to the company for their loss.<sup>9</sup>

<sup>1</sup> *Hedges v. The Hudson River R. Co.*, 49 N. Y. (4 Sickels), 223; *Lemke v. The Chicago, Milwaukee & St. Paul Ry. Co.*, 39 Wis. 449, 13 Am. Ry. Rep. 406.

<sup>2</sup> *Hedges v. The Hudson River R. Co.*, 49 N. Y. (4 Sickels), 223, 226; *Lemke v. C. & M. & St. P. Ry. Co.*, *supra*.

<sup>3</sup> *Hedges v. The Hudson River R. Co.*, 49 N. Y. 223, 226.

<sup>4</sup> *Hedges v. The Hudson River R. Co.*, *supra*; *Goodwin v. Baltimore & Ohio R. R. Co.*, 50 N. Y. (5 Sickels),

154.

<sup>5</sup> *Hedges v. The Hudson River R. Co.*, *supra*; *Goodwin v. The Baltimore & Ohio R. R. Co.*, 50 N. Y. (5 Sickels), 154.

<sup>6</sup> *Pelton v. The Rensselaer & Saratoga R. R. Co.*, 54 N. Y. (9 Sickels), 216.

<sup>7</sup> *Pelton v. The Rensselaer & Saratoga R. R. Co.*, *supra*.

<sup>8</sup> *Pelton v. The Rensselaer & Saratoga R. R. Co.*, *supra*.

<sup>9</sup> *Anchor Line v. Knowles*, 66 Ill. 150.



In Georgia, notice is required to the consignee, if there residing, of the arrival of the goods; and thereafter, if not taken away in a reasonable time, they may be warehoused, which will then relieve the carrier from further responsibility as carrier, and replace the same with that of warehouseman, if stored in the carrier's own warehouse.<sup>1</sup> But if warehoused without giving or attempting to give notice of the arrival, such erroneous proceeding will not amount to a delivery by the carrier, and the carrier's responsibility will continue.<sup>2</sup>

The ruling in Louisiana is, that the consignee of goods transported by a common carrier is entitled to a reasonable time and opportunity to remove the goods, by the exercise of proper watchfulness, before the responsibility of the carrier ends;<sup>3</sup> and if the goods be warehoused, it is not a sufficient delivery for the company to point them out, and inform the consignee that there is his property, and request him to take it away.<sup>4</sup> The care of the respective parties is mutual, as we understand it, whether the goods be on the platform, and this occur at their arrival, or whether they be stored. In either case, there is mutual care until the goods are removed, or a reasonable time and opportunity is given for such removal; but in the latter case, the care required is merely that of a warehouseman.

Whether it be ordinarily the duty, or not, of a railroad company to give notice of the arrival of goods carried by it when the same arrive at their destined station, yet where goods have failed to arrive within a reasonable time, and after repeated inquiries at the proper depot and office for the same, assurances be given to the consignee, or person entitled to receive them, that notice of their arrival will be given him, then it becomes obligatory upon the company to give notice of their arrival. The

<sup>1</sup> *Rome R. R. Co. v. Sullivan, Cabot & Co.*, 14 Geo. 277.

<sup>2</sup> *Rome R. R. Co. v. Sullivan, Cabot & Co.*, 14 Geo. 277. But in a later case the rule is held to be, that if the goods arrive within the usual time required for transportation, no notice is required to terminate the liability as common carrier; but if they arrive out of time, and after they have been

demanded by the consignee, notice is necessary: *Southwestern R. R. Co. v. Felder*, 46 Ga. 433, 11 Am. Ry. Rep. 419.

<sup>3</sup> *Maignan & Laborde v. New Orleans, Jackson & Great Northern R. R. Co.*, 24 La. An. 333.

<sup>4</sup> *Maignan & Laborde v. N. Orleans, Jackson & Great Northern R. R. Co.*, 24 La. An. 333.

promise thus made by the freight agent, in the line of his business, is binding on the company.<sup>1</sup>

The company, or other common carrier, is not bound to deliver the goods to any and every one claiming authority to receive the same; they have a right to reasonably satisfactory evidence of the correctness of such claim. If there be ambiguity or uncertainty in their direction, or from other cause the consignee be doubtful, the carrier may warehouse and hold the goods until proper evidence of ownership be produced. Mere initials, as a direction, are insufficient. The consignor, and not the carrier, must take the responsibility of insufficient direction, where there is no bill of lading showing the true owner or consignee.<sup>2</sup>

While it is not every failure of a common carrier to deliver the goods in good order, as received, that will subject him to liability for full value, and compel him to answer as if a purchaser of the goods, yet a shipper is not bound to receive any and every remnant of the goods, in whatever condition the same may be, short of total destruction.<sup>3</sup>

The carrier's responsibility does not end by mere delivery on the platform or dock at the place of destination; there must be such actual delivery as fills the contract of carriers; or, if not applied for by the consignee, the goods must be safely warehoused; then the liability as carrier ceases, and that of warehouseman begins.<sup>4</sup>

The rule in Indiana is, that the presence of the consignee, and payment of the freight on goods, at the time of their arrival on the platform, is tantamount to a delivery thereof by the company, and receipt of them by the consignee, so far as to place the risk of their subsequent loss upon the consignee, if there be no other or further act or understanding on the subject.<sup>5</sup> The duty resulting from the position of common carrier is to carry the goods safely to the place of consignment, and there be ready to deliver them to the consignee. If not received by him, the

<sup>1</sup> *Tanner v. The Oil Creek R. R. Co.*, 53 Penn. St. 411.

<sup>2</sup> *Finn v. The Western R. R. Co.*, 102 Mass. 283.

<sup>3</sup> *Chicago & Rock Island R. R. Co.*

*v. Warren and another*, 16 Ill. 502.

<sup>4</sup> *Chicago & Rock Island R. R. Co.*

*v. Warren and another*, 16 Ill. 502.

<sup>5</sup> *New Albany & Salem R. R. Co. v. Campbell and others*, 12 Ind. 55, 59.

carrier must store them safely. Thenceforth the carrier is but a warehouseman, and is liable only as such.<sup>1</sup>

In the American states, it is a well settled general rule of law that, in the absence of any special contract as to freights going over connecting lines, it is the duty of the carrier to carry safely to the end of his line, and there deliver to the next carrier in the route beyond, and so doing, the carrier is discharged.<sup>2</sup> The result of the American cases, says HUNT, Justice, in *The Railroad Company v. Pratt*, above cited, limits the carrier's liability to his own line, when no special contract is made (although there are cases which hold the liability as continuing throughout the whole route), and such is the English doctrine.<sup>3</sup> But it is equally well settled, in many of the states, that railroad companies may, by special contract or undertaking, subject themselves to the obligations of carriers beyond their own lines.<sup>4</sup> The giving of a bill of lading, by one of two or more connecting lines of railroads, for the transportation of goods over both, or over parts of both, such roads, is evidence proper for the jury, as tending to show a contract to carry to the point designated in said bill of lading as that to which the goods were to be carried.<sup>5</sup>

And so jealous is the law in guarding the rights of shippers against contracts of carriers exempting themselves from the con-

<sup>1</sup> *New Albany & Salem R. R. Co. v. Campbell and others*, 12 Ind. 55, 59.

<sup>2</sup> *Ogdensburg & Lake Champlain R. Co. v. Pratt*, 22 Wall. 123, 129; *Mich. Cent. R. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 324. And where there is a provision in the charter holding the company responsible for goods in their possession "awaiting delivery," this was held applicable to goods held by them for delivery to another carrier: *Michigan Central R. R. Co. v. Lantz*, 32 Mich. 502, 8 Am. Ry. Rep. 74. In this case it was attempted to amend the declaration, so as to charge the defendant as a warehouseman, after the cause of action had been barred by limitation; but it was not allowed: *People ex rel. v. Judge of Kalamazoo Circuit*, 35 Mich. 227, 15 Am. Ry. Rep. 349. And see *People ex rel. v.*

*Judge of Newaygo Circuit*, 27 Mich. 138, to same effect.

<sup>3</sup> *Ogdensburg & Lake Champlain R. Co. v. Pratt*, 22 Wall. 123, 129.

<sup>4</sup> *Ogdensburg & Lake Champlain R. Co. v. Pratt*, 22 Wall. 123; *Bissell v. Michigan S. & N. Ind. R. R. Co.*, 22 N. Y. 258; *Buffett v. Troy & Boston R. R. Co.*, 40 N. Y. (1 Hand), 168; *Root v. Great Western R. R. Co.*, 45 N. Y. 524; *Noyes v. Rutland & Burlington R. R. Co.*, 27 Vt. 110; *Morse v. Brainard*, 41 Vt. 550; *The Hill Manf. Co. v. Boston & Lowell R. R. Co.*, 104 Mass. 122; *Feital v. Middlesex R. R. Co.*, 109 Mass. 398.

<sup>5</sup> *Railroad Co. v. Pratt*, 22 Wall. 123. And rules and regulations posted up in the office of the company to the contrary, will not serve to modify such undertaking: *Id.*

sequences of their own negligence, and so obligatory is the duty of carriers to furnish suitable vehicles and appliances for the transportation of property received to be carried, that the knowledge of shippers of the character of cars furnished will not exempt the company from liability for loss occasioned by the insufficiency thereof, although the contract of shipment be that there shall be no such responsibility on the part of the company.<sup>1</sup>

**21. Right of carrier to a receipt when goods are delivered; effect thereof.**—Before delivery of the goods, or at least simultaneously therewith, a railroad company has a right to a receipt for the goods which it has carried.<sup>2</sup> So has the owner a right to examine the goods before receiving them, and executing a receipt for the same;<sup>3</sup> but the examination is to be before, and at the place of, delivery, unless otherwise allowed by the company.<sup>4</sup> The receipt, when given, is *prima facie* evidence of what it contains or states, and of performance accordingly on the part of the company; but when made before the goods are examined, it is not incapable of being explained, by showing the actual state of the case.<sup>5</sup> The Supreme Court of Iowa, WRIGHT, J., say, in *Skinner v. The Chicago & Rock Island Railroad Company*, in reference to the right of a carrier to have such a receipt, “we can certainly conceive of no more reasonable rule, nor one that would tend more to the necessary protection and convenience of a company engaged in the business of common carriers, than that which requires a receipt upon the delivery of a cargo. They have transactions with hundreds of persons, perhaps every day, are constantly delivering packages of greater or less value, and to say that they might not by the action of the board of directors, or that of the officer having charge of that particular branch of the business, make such a regulation, would take from them

<sup>1</sup> *Railroad Co. v. Pratt*, 22 Wall. 123.

<sup>2</sup> *Porter v. The Chi. & N. W. Ry. Co.*, 20 Iowa, 73, 78, 79; *Skinner v. The Chi. & Rock Isld. R. R. Co.*, 12 Iowa, 191. And so the last of several connecting carriers may require the production of the bill of lading, or evidence that its non-production will leave no liability upon them: *Bass*

*v. Glover*, 63 Ga. 745; S. C. 1 Am. & Eng. R. R. Cas. 277.

<sup>3</sup> *Skinner v. Chi. & Rock Isld. R. R. Co.*, 12 Iowa, 191, 194.

<sup>4</sup> *Porter v. The Chi. & N. W. Ry. Co.*, 20 Iowa, 73; *Skinner v. Chi. & Rock Isld. R. R. Co.*, 12 Iowa, 191.

<sup>5</sup> *Porter v. Chi. & N. W. Ry. Co.*, 20 Iowa, 73.

a power necessary for their own protection, and the exercise of which could not reasonably injure any one."<sup>1</sup>

Such a receipt is not conclusive in law. If the property be removed, and an alleged loss be discovered thereafter, then the difficulty of bringing the loss home to the company will be proportionately increased, if not wholly impracticable;<sup>2</sup> yet each case must turn upon and be governed by its own circumstances, and the force and weight of the receipt are in some measure dependent on the facts in reference to its execution and delivery. Still, we are not prepared to say that a recovery may not be had where the loss is discovered after the removal and change of custody of the goods, if the proof be such as to prevent mistake or imposition, and clearly shows that the loss could only have occurred while in course of transportation.

**22. Wharfage—Company not bound to furnish.**—Though railroad companies, as common carriers, when acting as such, are bound to accommodate all alike, without discrimination, yet it does not certainly result therefrom that such companies, owning a wharf at the terminus of their roads, are bound to extend the use thereof to all those alike whose property is transported over their road. More especially is such the case where the accommodations afforded by such wharf are insufficient for all. In such cases some must necessarily be excluded, as the companies are not bound in law to furnish the same for any of them; and therefore the company, in each particular case, will be left to elect, in such and like cases, which of its customers will be admitted to the benefit.<sup>3</sup> When such election is made by the company in the exercise of their discretion, whether exercised wisely or unwisely, a court of justice will not interfere to decide; for to do so, we may well add, would involve the necessity of enforcing action in accordance with its decision, and the enforcement of jurisdiction to that extent involves the actual administration of the company's affairs, or, at the least, the direction thereof, from

<sup>1</sup> *Skinner v. The Chicago & Rock Island R. R. Co.*, 12 Iowa, 191, 194; *Merrihew v. Milwaukee & Miss. R. R. Co.*, 5 Am. Law Reg. 364.

<sup>2</sup> *Porter v. Chi. & N. W. Ry. Co.*, 20 Iowa, 73, 79.

<sup>3</sup> *Audenried v. Phila. & Reading R.*

*Co.*, 68 Penn. St. 370; S. C. 8 Am. R. 195. The court will not interfere with such election, as to do so would substitute the chancellor as manager of the road to that extent, instead of the directory thereof and proper officers: *Ib.*

time to time, in that respect.<sup>1</sup> The Supreme Court of Pennsylvania say, in the case here cited: To do so "would be in effect to deprive the directors of corporations of their management, and to substitute the chancellor as supreme director or manager."<sup>2</sup>

**23. Direction, and loss by misdirection of the goods.**—It is clearly a duty of the consignor or shipper of goods to give the carrier open and definitely correct directions as to the name of the consignee and the place of consignment; and while a loss resulting from negligence in this behalf will rightfully fall upon the consignee,<sup>3</sup> yet if the goods be properly marked in this respect, when received by the company for transportation, and be so misdirected by its servant or agent, in the bill of lading sent with them, as to cause a loss, then the company will be liable for the same.<sup>4</sup>

**24. Obligation of railroad companies as warehousemen.**—The obligation of railroad companies as warehousemen, in relation to property held by them as such, after their relation as carriers ceases to exist, is not other or different from that of warehousemen ordinarily. It is well settled that they are responsible for due care in storing the goods in a place of reasonable safety, and can be charged only upon proof of their own negligence or wrong act, or that of their servants in the course of their employment as servants.<sup>5</sup> And where the daily average of goods stored in a railroad warehouse is inconsiderable,

<sup>1</sup> Audenried v. Phila. & Reading R. Co., 68 Penn. St. 370.

<sup>2</sup> 68 Penn. St. 380.

<sup>3</sup> Congar v. Chicago & N. W. Ry. Co., 24 Wis. 157, 1 Am. R. 164; Lake Shore & Mich. Southern Ry. Co. v. Hodapp, 83 Penn. St. 22, 16 Am. Ry. Rep. 167.

<sup>4</sup> Meyer v. Chicago & N. W. Ry. Co., 24 Wis. 566; S. C. 1 Am. R. 207; Jeffersonville R. R. Co. v. Cotton, 29 Ind. 498. But where such misdirection by an agent of the company is in consequence of directions of the consignor, and delay is occasioned thereby, during which the goods are destroyed by fire, the company is not liable: Erie Ry. Co. v. Wilcox, 84 Ill.

239, 16 Am. Ry. Rep. 457.

<sup>5</sup> Aldrich v. Boston & Worcester R. Co., 100 Mass. 31; S. C. 1 Am. R. 76; Porter v. Chi. & N. W. Ry. Co., 20 Iowa, 73; Ill. Cent. R. R. Co. v. Alexander and others, 20 Ill. 23; Whitney v. Chicago & Northwestern Ry. Co., 27 Wis. 327, 5 Am. Ry. Rep. 291; Pike v. Chicago, Milwaukee & St. Paul Ry. Co., 40 Wis. 583, 13 Am. Ry. Rep. 447. Where the complaint contains counts charging liability both as common carriers and as warehousemen, the plaintiff will not be compelled to elect on which to recover, before the evidence is all in at least: Whitney v. C. & N. W. Ry. Co., *supra*.

ordinary care will not require the company to keep a night watch therein.<sup>1</sup>

They are not insurers against loss occasioned by accidental fire, or fires not traceable to their own or their servants' acts or negligence;<sup>2</sup> and if that of the servant, it must be for acts done or omitted, or negligence occurring, within the scope of his duties and employment.<sup>3</sup> As to whether the acts or omissions are within the scope of the servants' employment, this depends upon their liability or not to their principal for such acts or omissions. Thus, where goods in the warehouse of a railroad company are burned with the burning of the house, the fact that clerks, brakemen, baggage-masters, superintendents of tracks, and a day clerk of the burning house (but who did not at night have a key), or clerk for checking freight, as received or delivered, and also to help to deliver freights, were present, or made their appearance at the fire, but made no effort to save the burning goods, or that by their efforts the goods might have been saved, the principal superintendent or general agent in charge of the warehouse not being himself present, nor in fault for his absence, by reason of none of these circumstances does liability occur on the part of the company for the loss of the goods. None of these persons thus recognized as present would be liable to suit for not volunteering to extinguish the fire or to save the goods, and therefore, the company itself is not liable for their conduct. They would, in such case, have the same liberty of other persons at fires, and might assist or not, at pleasure, and also elect whom, or in behalf of whose interests, they would assist.<sup>4</sup>

CATON, C. J., in the case cited from 20th Illinois, *The Illinois*

<sup>1</sup>*Pike v. C., M. & St. P. Ry. Co.*, *supra*; *Kronshage v. Same*, 40 Wis. 587, 13 Am. Ry. Rep. 452.

<sup>2</sup>*Francis v. Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60; *Aldrich v. Boston & Worcester R. R. Co.*, 100 Mass. 31; S. C. 1 Am. R. 76; *Fenner v. Buffalo & State Line R. R. Co.*, 44 N. Y. 505; S. C. 4 Am. R. 709. Where the action is for loss by fire, evidence showing the liability of the warehouse to take fire is proper; also evi-

dence of negligence in not storing goods safely and properly: *Whitney v. C. & N. W. Ry. Co.*, *supra*.

<sup>3</sup>*Aldrich v. The Boston & Worcester R. R. Co.*, 100 Mass. 31; S. C. 1 Am. R. 76; *Francis v. Dubuque & Sioux City R. R. Co.*, 25 Iowa, 60; *Fenner v. The Buffalo & State Line R. R. Co.*, 44 N. Y. 505; S. C. 4 Am. R. 709.

<sup>4</sup>*Aldrich v. Boston & Worcester R. R. Co.*, 100 Mass. 31.

*Central Railroad Company v. Alexander and others*, says: The law is now too well settled to bear discussion, that a railroad company may assume the double character of carriers and warehousemen; that their duty as carriers is ended when they have placed the goods in a safe depot of their own, or any other warehouse; that their depot is their warehouse, and that for warehouse services they may charge a reasonable compensation, as may other warehousemen; that after their relation to the goods as common carriers ceases by the goods being stored, they are then to be considered and treated in law, in relation thereto, the same as other warehousemen would be in case the goods had been deposited in another warehouse; and that a lien in either case accrues for the warehouse charges, for which they may be retained until paid.<sup>1</sup>

**25. Liability over, to an underwriter.**—It is a settled principle of the law that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for loss or injury is primarily upon the carrier, and that the liability of the insurer is only secondary;<sup>2</sup> and though the contract of the carrier may not be first in the order of time, it is nevertheless the first, and principal, as to ultimate liability.<sup>3</sup> The insurer's position relatively toward that of the carrier, is the same as that of a surety to his principal.<sup>4</sup> Therefore, when the insurer has paid the owner of the goods for the loss, he is then entitled to stand in the place which the satisfied owner stood in before his claim was satisfied, and may successfully resort to all the legal means of enforcing the claim for his own benefit, against the carrier, that the owner himself might have availed himself of.<sup>5</sup> It follows from this principle that the insurer, when he has paid

<sup>1</sup> 20 Ill. 29. The carrier will not be liable, as for a conversion, by an inadvertent statement of his servant that the freight had not arrived: *Louisville & Nashville R. R. Co. v. Campbell*, 7 Heisk. 253, 12 Am. Ry. Rep. 490.

<sup>2</sup> *Hall & Long v. Nashville & Chattanooga R. R. Co.*, 13 Wall. 367; *Hart and another v. The Western R. R. Co.*, 13 Met. 99.

<sup>3</sup> *Hall & Long v. Railroad Co.*, 13 Wall. 367.

<sup>4</sup> *Hall & Long v. Railroad Co.*, 13 Wall. 367.

<sup>5</sup> *Hall & Long v. Railroad Co.*, 13 Wall. 367; *Swarthout v. Chicago & Northwestern Ry. Co.*, 49 Wis. 625; 6 N. W. Repr. 314, 21 Am. Ry. Rep. 153.



the loss, may proceed, in the name of the owner, in an action against the carrier whose failure caused the loss.<sup>1</sup>

The suit, in such cases, in behalf of, or for the benefit of, the insurer, is to be brought in the name of the owner or shipper of the goods, and not in that of the insurer.<sup>2</sup> For this purpose, the insurer has a right to use such name, and it is not in the power of the owner, who suffered the loss and has been paid by the insurer, to prevent such a proceeding; nor can he release the action, when so brought in his name for the insurer's use.<sup>3</sup>

**26. Liability to a bailee or special owner consigning goods.**—Though the person delivering or consigning goods to a carrier to be carried be but a bailee thereof, or has only a special ownership therein, yet he may recover for loss or injury of the goods; and the carrier, in such case, can not go behind the possession and special ownership of the plaintiff, to defeat an action for damages for injury to or loss of the goods.<sup>4</sup>

**27. Railroad companies not common carriers of live stock or of express matter at common law.**—Railroad companies are not, unless they assume, by custom or contract, so to become, common carriers, within the ordinary meaning and legal obligations of that term, in reference to the receipt and carriage of live stock, or living animals of any description whatever.<sup>5</sup> They may, therefore, legally decline to carry such property, unless upon terms, as to the manner of carriage and rates of com-

<sup>1</sup> *Hall & Long v. Railroad Co.*, 13 Wall. 367; *Swarthout v. C. & N. W. Ry. Co.*, *supra*. And this, too, without an assignment: *Swarthout v. C. & N. W. Ry. Co.* And where the assignment is made to several companies, they may maintain the action jointly. *Ibid*.

<sup>2</sup> *Hart v. Western R. R. Co.*, 13 Met. 99; *Hall & Long v. R. R. Co.*, 13 Wall. 367, 371, 372.

<sup>3</sup> *Hart v. Western R. R. Co.*, 13 Met. 99; *Hall & Long v. R. R. Co.*, 13 Wall. 367, 371, 372.

<sup>4</sup> *Moran v. Portland Steam Packet Co.*, 35 Maine, 55; *Smith v. James*, 7 Cow. 328; *Everett v. Saltus*, 15 Wend.

474.

<sup>5</sup> *The Michigan Southern & N. Indiana R. R. Co. v. McDonough*, 21 Mich. 165; S. C. 4 Am. R. 466; *Lake Shore & Mich. So. R. R. Co. v. Perkins*, 25 Mich. 329; *Smith v. New Haven & Northampton R. R. Co.*, 12 Allen, 531; *Farmers' and Mechanics' Bank v. Champlain Transportation Co.*, 23 Vt. 186, 200; *Louisville, Cin. & Lex. R. R. Co. v. Hedger*, 9 Bush, 645; *Rixford v. Smith*, 52 N. H. 355; *Clarke v. The Rochester & Syracuse R. R. Co.*, 14 N. Y. 573; *Penn. v. Buffalo & Erie R. R. Co.*, 49 N. Y. 204; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375.

pensation, agreed to by themselves, or else as indicated by previous custom, in case there be no special agreement.<sup>1</sup>

Such companies not being common carriers of living animals, within the common law meaning of that term, it follows that statutes regulating the conduct of railroad companies as to their order or manner of carriage, as also statutes preventing the limiting of common law liability by contracts of affreightment, do not apply to the carriage, or to contracts for carriage, of live stock or living animals upon such roads; for if such companies have not become common carriers of such property, then there is no common law liability in reference thereto which may be the subject of such contracts, or necessitate the making thereof, and such statutes can have no application to the carriage of that species of property.<sup>2</sup>

It follows from these principles, that in case of litigation growing out of alleged loss or damage in the carriage of live stock, the burden of proof is upon the plaintiff, claiming such damages, to show that the company actually contracted to carry the property in question as such, or else held itself out to the public as common carriers of this kind of property; and the company, as defendant in such actions, will not be bound to show any facts going to qualify their liability as common carriers, until it shall have first been shown, or proof be first given tending to show, that it had in some manner become such, in reference to such property.<sup>3</sup>

A railroad company may lawfully hire the use of its cars to persons for the transportation of live stock and other property, and agree to haul or transport the same. When so hired, the duty or obligation of the company is measured by their contract to transport the cars, but does not extend to the manner of loading the same, and the personal care of that wherewith they are loaded, unless so agreed.<sup>4</sup> The hirers have full control of that matter, and are alone responsible for the consequences of their conduct in that respect, as also for losses caused by inherent defects, or qualities of decay in the property—such, for instance, as

<sup>1</sup>The Michigan Southern & N. Indiana R. R. Co. v. McDonough, 21 Mich. 165.

<sup>2</sup>Michigan Southern & N. Ind. R. R. Co. v. McDonough, 21 Mich. 165.

<sup>3</sup>Michigan Southern & N. Indiana R. R. Co. v. McDonough, 21 Mich. 165; S. C. 4 Am. R. 466.

<sup>4</sup>Ohio & Miss. R. R. Co. v. Dunbar and another, 20 Ill. 623.

for loss of weight by falling off of the live stock.<sup>1</sup> The same principle would, by a parity of reasoning, apply to loss in weight of grain by shrinkage in weight, if the cars used are secure and tight.

The customary manner of carrying such property, by only furnishing the proper cars and motive power, and being responsible only for the sufficiency of appliances used, and the proper mode of making up and running the train, and the drover, with sufficient and experienced force, going along upon the same train free of charge, and having the management and entire control of the cattle, and the care and responsibility of watering and feeding the same—then the company's liability will extend no further than the obligations above referred to, of furnishing sufficient and proper cars and motive power, and to the proper mode of managing, making up and running of such train;<sup>2</sup> but will of course be liable for gross negligence or wrong acts in reference to conducting such trains.

If a company has only held itself out and professed to carry cattle, or other live stock, on the terms that the property in course of transit should all the time be under the control, care and management of the owner, and not under the care of the company, the latter merely furnishing proper cars and motive power, and being responsible only for the proper making up and running of trains, it will not, by reason thereof, be deemed in law a common carrier; but the company will nevertheless be under the same obligations, in reference to all things not pertaining to the care, risk and management of the stock, or to its reception and delivery, as it is under as common carrier of other property generally.<sup>3</sup>

The reason of the transportation of live stock not coming within the general duties and liabilities of a common carrier, is not only the increased trouble and care, but that such property is less manageable than inanimate things, and therefore more

<sup>1</sup> *Ohio & Miss. R. R. Co. v. Dunbar* and another, 20 Ill. 623.

<sup>2</sup> *The Michigan Southern & N. Indiana R. R. Co. v. McDonough*, 21 Mich. 165; *East Tenn. & Geo. R. R. Co. v. Whittle*, 27 Geo. 535. But there is an implied undertaking by the com-

pany that the cars and appliances are of suitable quality: *East Tenn. & Geo. R. R. Co. v. Whittle*, *supra*.

<sup>3</sup> *The Michigan Southern & N. Indiana R. R. Co. v. McDonough*, 21 Mich. 165.

liable to injury; and also that when the common law liability of carriers was fixed, such property was not used to be transported by carriers, and therefore the reason of the law not having then existed, and not being now applicable, the law itself, as to this particular vocation, can not be considered as applicable to a new and more risky and troublesome business than at that time appertained to the vocation of common carrier.<sup>1</sup>

Justice CHRISTIANCY, in the case cited from 21st Michigan, lays down the rule of exemption, and the reason thereof, so justly and forcibly, that we here insert that portion of his learned opinion, in his own language: "The transportation of cattle and live stock by common carriers by land was unknown to the common law, when the duties and responsibilities of common carriers were fixed, making them insurers against all losses and injuries not arising from the act of God or of the public enemies. These responsibilities and duties were fixed with reference to kinds of property involving, in their transportation, much fewer risks, and of quite a different kind, from those which are incident to the transportation of live stock by railroad. Animals have wants of their own to be supplied; and this is a mode of conveyance at which, from their nature and habits, most animals instinctively revolt; and cattle especially, crowded in a dense mass, frightened by the noise of the engine, the rattling, jolting, and frequent concussions of the cars, in their frenzy injure each other by trampling, plunging, goring, or throwing down; and frequently, on long routes, their strength exhausted by hunger and thirst, fatigue and fright, the weak easily fall and are trampled upon, and unless helped up, must soon die. Hogs also swelter and perish.<sup>2</sup> \* \* \* It is a mode of transportation which, but for its necessity, would be gross cruelty and indictable as such. The risk may be greatly lessened by care and vigilance, by feeding and watering at proper intervals, by getting up those that are down, and otherwise. But this imposes a degree of care and an amount of labor so different from what is required in reference to other kinds of property, that I do not

<sup>1</sup> Michigan Southern & N. Indiana R. R. Co. v. McDonough, 21 Mich. 161; S. C. 4 Am. R. 466; Clarke v. The Rochester & Syracuse R. R. Co.,

14 N. Y. 573.

<sup>2</sup> The Michigan Southern & N. Indiana R. R. Co. v. McDonough, 21 Mich. 189.

think this kind of property falls within the reasons upon which the common law liabilities of common carriers was fixed."

Were it within the scope of our purpose in this treatise to advert back to the English rulings on this subject, they would be found to accord with those of the American courts above cited.<sup>1</sup> In fact, these very cases seemed to have been decided, for the most part, upon the authority of the English ones, so far as legal authorities and precedents, apart from the reason of the rule announced, were considered.

We think it may be safely said here, that railroad companies not being common carriers of live stock at common law, then no statutory enactment, unless allowed by the charter grant, declaring them common carriers of such property, or prohibiting them from carrying impliedly on other principles of liability than those of the common law, or preventing special contracts to thus carry such property upon limited terms of liability, would be of any validity, in view of that constitutional provision prohibiting laws impairing the obligation of contracts, which is construed to apply as well to the prohibition of making, as to the impairing of those already made.

A contrary ruling, as to the liability of railroad companies as carriers of live stock, is to be found in some of the states, in which it is maintained that railroad companies are common carriers in relation to live stock, as ordinarily transported by them, to the same extent as they are in the transportation of ordinary merchandise and other inanimate property.<sup>2</sup> We make no doubt that they may become such by holding themselves out for the reception, care and transportation thereof, as of other property, and receiving full charge of the same dur-

<sup>1</sup> See *Palmer v. Grand Junction R. W. Co.*, 4 M. & W. 749; *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Exch. 707; *McManus v. Same*, 2 Hurl. & N. 693; *Pardington v. South Wales R. W. Co.*, 1 *Id.* 396; *Harrison v. London, Brighton & S. C. Ry. Co.*, 2 Best & Smith, 122; *Blower v. Great Western Ry. Co.*, Law Rep. 7 C. P. 655; *Kendall v. London & Southwestern Ry. Co.*, Law Rep. 7 Exch. 373.

<sup>2</sup> *Kansas Pacific R. W. Co. v. Reynolds and others*, 8 Kansas, 623; *Kan-*

*sas Pacific R. W. Co. v. Nichols and others*, 9 Kansas, 235; *Atchison & Neb. R. R. Co. v. Washburn*, 5 Brown (Neb.), 117, 19 Am. Ry. Rep. 139; *Kimball v. Rutland & Burlington R. R. Co.*, 26 Vt. 247; *Wilson v. Hamilton*, 4 Ohio St. 722; *Welsh v. Pittsburg, Ft. Wayne & Chicago R. R. Co.*, 10 *Id.* 65; *South & North Ala. R. Co. v. Henlein*, 52 Ala. (N. S.), 606; *Smith v. New Haven & Northampton R. R. Co.*, 12 Allen, 531; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142.

ing transit; but unless they do so, our opinion is with the ruling in the cases cited from 21st Michigan, 12 Allen, and others of that class. We think they are carriers rather of the cars, and that the care of the live stock devolves, during transit, on the owners thereof, and that they themselves continue in the immediate possession thereof; that the company furnish the road and the motive power, and are under obligation in that respect to have the same, and other appliances of transportation, road-worthy and safe, and are bound to transport the cars in safety, in which respect their obligation, in case there be no contract to the contrary, is as that of a common carrier; but that such obligation does not extend to injuries or loss sustained in reference to the keeping, care or management of the live stock within the cars, or in reference to the feeding, caring for or watering the same, or of injuries inflicted by the animals on each other; these are matters for the owner's regard and supervision, which in the nature of things are not within the business of railroad companies, or within the duties of railroad operatives.

Although railroad companies are held to be common carriers in Kansas, when engaged in the carrying of live stock, yet it is also there held that they may, by special contract, limit their liability in respect thereto, except as against the result of their own negligence or the negligence of their employees;<sup>1</sup> and in cases of litigation turning on, or involving the question of, negligence, and growing out of such contracts limiting liability in the carriage of live stock, the *onus probandi* is on the plaintiff, in a suit against a company, to establish such negligence by competent proof; it will not be presumed.<sup>2</sup>

Under a contract for the transportation of live stock, it is the duty of the company to transport according to the usual course of business, without any discrimination against that particular species of freight as to the order of transportation, but that it is to be forwarded in the order in which it is received, although the

<sup>1</sup> Kansas Pacific Ry. Co. v. Reynolds and others, 8 Kans. 623, 641; Kansas Pacific Ry. Co. v. Nichols and others, 9 Kansas, 235; Illinois Cent. R. R. Co. v. Adams, 42 Ill. 474; McDaniel v. Chicago & Northwestern Ry. Co., 24 Ia. 412; Morrison v. Phil-

lips & Colby Const. Co., 44 Wis. 405, 19 Am. Ry. Rep. 312.

<sup>2</sup> Kans. Pac. Ry. Co. v. Reynolds, *supra*; Kansas Pac. Ry. Co. v. Nichols, *supra*; Clark v. St. Louis, Kansas City & Northern Ry. Co., 64 Mo. 440, 17 Am. Ry. Rep. 284.

transportation be under a special contract, placing "all risk of loss, injury, damage and other contingencies in loading, unloading, conveyance and otherwise," upon the owner of the animals; and that the company "do not undertake to forward the animals by any particular train, or at any specified hour," and are not "responsible for the delivery of the animals, within any certain time, or for any particular market"; and "are not responsible for any negligence, default, misconduct, or otherwise, on the part of the company or their servants, or of any other person whomsoever causing or tending to cause the death," etc. By such contract, the carrier is bound to transport in the usual way and time; and leaving the cattle on a side track, exposed to injury, for three days, where they could neither be unloaded, fed nor watered, without any excuse, so that many of them die, amounts to an entire abandonment of the contract of transportation, and the company are liable for the loss.<sup>1</sup>

Though a railroad company contract to carry live stock by the car load, under a contract by which the owner may place in the car as many cattle as he can, yet the company is a common carrier in that respect, so far as regards the character and sufficiency of the car.<sup>2</sup> And though the owner pass free, as having charge of the cattle, yet he has no power over the train, or the management thereof. The company are bound to furnish a suitable and safe car, and in default thereof are liable for loss of the owner incurred by reason of such default;<sup>3</sup> nor does the presence of the owner alter the rule of law in this respect.<sup>4</sup>

But the carrier of live stock is not liable for injuries or damage thereto growing out of the animals' own vitality, or for injuries by refusing food, or from fright, or by reason of the peculiar propensity or habits of the animals to themselves or toward each other.<sup>5</sup> And although the carrier insures the arrival of the property at the place of destination, against everything but the act of God and of the public enemy, yet the con-

<sup>1</sup> Keeney and another v. The Grand Trunk R. R. Co. of Canada, 47 N. Y. (2 Sickels), 525.

<sup>2</sup> Peters v. N. Orleans, Jackson & Great N. R. R. Co., 16 La. An. 222.

<sup>3</sup> Peters v. N. Orleans, Jackson & Great N. R. R. Co., 16 La. An. 222.

<sup>4</sup> Peters v. N. Orleans, Jackson & Great N. R. R. Co., 16 La. An. 222.

<sup>5</sup> Smith v. New Haven & Northampton R. R. Co., 12 Allen, 531; Evans v. Fitchburg R. R. Co., 111 Mass. 142; South & North Ala. R. R. Co. v. Henlein, 52 Ala., (N. S.), 606.

dition in which it shall be when it arrives there must necessarily depend, in some respects, upon the nature of the property transported,<sup>1</sup> if, indeed, the full common law rule of liability is applicable to carriers of live stock. On this subject there is a conflict of authority, and the principles so well settled in regard to the carriage of ordinary inanimate property are not, to our mind, at all applicable to the carriage of live stock in large quantities upon long lines and connecting lines of railroad, in crowded cars, which, though drawn by the companies over whose roads they pass, are carried by the car-load, and the owners or servants thereof all the time continue with them, and have charge and care thereof, and water, feed and care for the same—they being best competent, from their own knowledge of their peculiar habits and wants of the stock, to care for the animals. But if received to be cared for and carried by the company, exclusive of any care or accompaniment of the owners, and on the ordinary terms, then the rule of strict liability would be less unreasonable. We think, however, that railroad companies are not bound in law to receive and carry live stock upon any such terms of common law liability, but may make their own terms, and in default of compliance therewith may decline to receive and carry such at all. They can not be compelled to perform the duties both of carriers and of herdsmen and hostlers, which latter avocations are not contemplated by the nature of their organization.

But be this as it may, and whether they be received for carriage subject to the one rule or the other, in either case the vehicles and cars must be sufficiently strong to secure them; and if otherwise, and loss thereby occurs, without the owner's fault, the company will be liable.<sup>2</sup> But where the owner of the animals, as hereinbefore stated, goes with and retains the custody of the animals, and cares for them himself, by the terms of carriage, during transit, the strict rule of common law liability does not apply. The company are bound for the safe arrival of the car and property, as against its own negligence, or insufficient road and appliances, but not for the condition or personal care of the animals.<sup>3</sup>

<sup>1</sup> *Smith v. New Haven & Northampton R. R. Co.*, 12 Allen, 531.

*ampton R. R. Co.*, 12 Allen, 531.

<sup>2</sup> *Smith v. New Haven & North-*

*ton R. R. Co.*, 12 Allen, 531, 534.



One who himself assists in loading live stock of his own into a particular car, without making any objection to the car at the time, will not be allowed thereafter to object to the character of the car as to suitability, in reference to anything apparent to him at the time of loading the stock into the same. In a controversy growing out of injury to the animals, he will not, as against things thus apparent to him, be allowed to say or testify that they ought to have been shipped in some other kind of car.<sup>1</sup> And where, by the contract of affreightment, the owner himself is to go along with and take care of the stock, he can not recover for any injury to them resulting from mere negligence of the company, to which by his own negligence he contributes.<sup>2</sup>

Although when the owner of live stock which is to be carried makes his own selection of the vehicle in which they are placed for carriage, and that selection is made under circumstances charging him with knowledge of the capabilities and defects of such vehicle, then the company are not responsible in respect thereof,<sup>3</sup> yet if there be defects which are not visible and palpable, it is in such a case the duty of the company to point out the same; and if not pointed out, it is the duty of the company, in an action involving the suitability of such vehicles, to prove that the defects were open, visible and apparent. Otherwise, if injury ensue by reason of such defect, the company are liable.<sup>4</sup>

For injury resulting to such stock from unreasonable delay in their carriage, or for want of an opportunity being allowed by the company to water the same, the company will be held responsible, if the owner himself be free from negligence or fault in respect thereto;<sup>5</sup> and when the question of negligence of either or both of the parties, in regard to such transaction,

<sup>1</sup> *Betts v. Farmers' Loan & Trust Co.*, 21 Wis. 80; *Chicago & N. Western Ry. Co. v. Van Dresar and another*, 22 Wis. 511; *Ohio & Miss. R. R. Co. v. Dunbar*, 20 Ill. 623; *East Tenn. & Ga. R. R. Co. v. Whittle*, 27 Ga. 535.

<sup>2</sup> *Chicago & N. Western Ry. Co. v. Van Dresar and another*, 22 Wis. 511.

<sup>3</sup> *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. (6 Smith), 232; *Illinois Cent. R. R. Co. v. Hall*, 58 Ill. 409, 11 Am. Ry. Rep. 95. And see *Pratt v.*

*Ogdensburg & Lake Champlain R. R. Co.*, 102 Mass. 557; *Betts v. Farmers' Loan & Trust Co.*, 21 Wis. 80; *Chicago & North Western Ry. Co. v. Van Dresar*, 22 *Id.* 511. But see *Welsh v. Pittsburg, Fort Wayne & Chicago R. R. Co.*, 10 Ohio St. 65; *Ogdensburg & Lake Champlain R. R. Co. v. Pratt*, 22 Wall. 123.

<sup>4</sup> *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. 232.

<sup>5</sup> *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. (6 Smith), 232.

rests upon conflicting or doubtful facts and circumstances, it is proper to refer the decision thereof to the jury.<sup>1</sup>

Carriers of live stock do not insure against such injuries as result from their natural propensities, and which foresight and vigilance may not prevent.<sup>2</sup> And if transported under a special agreement, the terms of that agreement determine the liability and rights of the parties,<sup>3</sup> unless the loss occurs by the willfulness or negligence of the carrier, who is, when there is a special agreement, a private, and not a common carrier.<sup>4</sup>

Though railroad companies are liable, according to the rules in relation to common carriers, for the safe carriage and arrival of things received to carry, yet they are not always responsible for the condition in which the goods arrive. Ordinary and natural decay, fermentation and natural shrinkage and leakage, spontaneous combustion, and like natural tendencies to injury, loss or decay, are matters to which the liability of the carrier does not extend;<sup>5</sup> therefore, the transportation of domestic animals is not subject to the precise rules of law as are packages of chattels or other inanimate things.<sup>6</sup> Living animals have ex-

<sup>1</sup> *Harris v. Northern Indiana R. R. Co.*, 20 N. Y. (6 Smith), 232.

<sup>2</sup> *Penn. v. The Buffalo & Erie R. R. Co.*, 49 N. Y. (4 Sickels), 204; *Cragin and others v. N. Y. Cent. R. R. Co.*, 51 N. Y. (6 Sickels), 61.

<sup>3</sup> *Penn. v. The Buffalo & Erie R. R. Co.*, 49 N. Y. (4 Sickels), 204; *South & North Ala. R. R. Co. v. Henlein*, 56 Ala. 368, 19 Am. Ry. Rep. 200. And so, if the agreement be for the transportation of a person, instead of live stock, the special agreement controls: *Poucher v. New York Cent. R. R. Co.*, 49 N. Y. (4 Sickels), 263; *Cragin and others v. The New York Cent. R. R. Co.*, 51 N. Y. 61. "In the transportation of such stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its own vitality. \* \* \*

the carrier is relieved from responsibility if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires." *Earl, Comr.*, in *Cragin and others v. New York Cent. R. R. Co.*, *supra*.

<sup>4</sup> *Penn. v. The Buffalo & Erie R. R. Co.*, 49 N. Y. 204; *S. & N. Ala. R. R. Co. v. Henlein*, *supra*. Such damages may be recouped by the shipper, in an action for the freights: *S. & N. Ala. R. R. Co. v. Henlein*. But such claim for damages can not be split up, and made the foundation of two or more suits; if an action is brought for a part only of the claim, it will be a bar to any further action or recovery of any kind: *Ibid*.

<sup>5</sup> *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 143, 144.

<sup>6</sup> *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 143, 144.

citabilities and volitions of their own, combativeness sometimes also. These increase greatly the risk and difficulty of safe carriage. They are carried in a mode opposed to their instincts and habits; they may become uncontrollable by fright or passion, and in spite of every precaution may injure or destroy themselves in efforts to regain their liberty, or may injure or kill each other. If they do one or the other, and the company have exercised the proper care and foresight to prevent it, there can be no recovery for the damages, if loss ensues.<sup>1</sup> In the case cited here from 6th Duer, the court say: "We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods."<sup>2</sup>

The phrase "feeding and watering," as ordinarily used in contracts for the transportation of live stock, has received a legal definition, and has reference, in contemplation of law, exclusively to ordinary sustenance, as food and drink, required by the animals during their transportation, and not to that outward application of water which is sometimes required for overheated hogs or other animals, to prevent their suffocation;<sup>3</sup> but where it is the custom of the railroad company to apply from its tanks water externally to hogs in an overheated condition, it will become liable for loss occasioned by refusal, on request, so to do.<sup>4</sup>

And so in Michigan the ruling is, that railroad corporations, though common carriers in respect to ordinary property carried by them, are not such in reference to the carriage of live stock; and that the mere fact that they are accustomed to carry such property on special terms, variant from those of common carriers,

<sup>1</sup> *Smith v. N. Haven & Northampton R. R. Co.*, 12 Allen, 531; *Evans v. Fitchburg R. R. Co.*, 111 Mass. 142, 144, 145; *Clarke v. Rochester & Syracuse R. R. Co.*, 14 N. Y. 570; *Conger v. Hudson River R. R. Co.*, 6 Duer, 375.

<sup>2</sup> 6 Duer, 381; cited by the court in

111 Mass. 145.

<sup>3</sup> *Ill. Cent. R. R. Co. v. Adams*, 42 Ill. 474.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Adams*, 42 Ill. 474. Against the effect of such negligence, no contract of exemption will protect the company: *Ib.*

does not make them common carriers in respect thereto.<sup>1</sup> The provisions of the act of assembly of that state, inhibiting such corporations from limiting their common law liability as carriers in respect to the carriage of property, apply, not to the carriage of live animals, but to such property only as the companies, under their charters, are bound to carry upon common law terms.<sup>2</sup>

So again, where the contract for the transportation of live animals exempted the company from damages caused by the negligence of servants of the company in loading, unloading, conveyance and otherwise, it is held that it still devolved on the company to furnish suitable and roadworthy cars, and that for injuries and loss incurred by the owner of the animals for want of such, the company were liable.<sup>3</sup>

**28. Lien for freights.**—Ordinarily, a common carrier has a lien for freights and charges upon goods carried, if the same have not been paid in advance;<sup>4</sup> and such lien exists also for back freights and charges paid by the carrier, if the custom be, as is sometimes the case, to pay such back charges by each carrier receiving the same, in turn, and thus carrying forward the whole freight and charges of the several lines over which the goods may pass, and collecting the same by the last carrier, on delivery of the goods.<sup>5</sup> But this lien does not, in either case, attach, as to goods shipped by one coming wrongfully into the possession of them, and who, therefore, has no right to ship them, or to

<sup>1</sup> *The Mich. Southern & N. Ind. R. R. Co. v. McDonough*, 21 Mich. (3 Clarke), 165; *Lake Shore & Mich. S. R. R. Co. v. Perkins*, 27 Mich. (3 Post), 329. And when charged in an action as common carriers of live stock, they must be proved to have undertaken as such: *Lake Shore & Mich. S. R. R. Co. v. Perkins*, *supra*. And where the complaint goes upon the defendant's negligence, and not upon his liability as common carrier, the recovery must be accordingly: *Morrison v. Phillips & Colby Const. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312.

<sup>2</sup> *The Mich. Southern & N. Ind. R. R. Co. v. McDonough*, 21 Mich. (3

Clarke), 165. Their obligation as to proper care and the running of trains are as at common law; but they are only bound to be prepared to meet the ordinary emergencies of their business: *Ib.*

<sup>3</sup> *Hawkins and another v. Great Western R. R. Co.*, 17 Mich. (4 Jennison), 57; *Great Western R. W. Co. v. Hawkins and another*, 18 Mich. (5 Jennison), 427; *Rhodes v. Louisville & Nashville R. R. Co.*, 9 Bush, 688.

<sup>4</sup> *Stevens and another v. Boston & Worcester R. R. Co.*, 8 Gray, 262; *Lane and others v. Old Colony & Fall River R. R. Co.*, 14 Gray, 143.

<sup>5</sup> *Stevens and another v. Boston & Worcester R. R. Co.*, 8 Gray, 262.

create a lien thereon.<sup>1</sup> The safety of the carrier, as to compensation, is in no wise jeopardized by this rule of law, as he has it in his power to require payment in advance, if he thinks proper so to do.

Such lien upon the property carried exists, however, only while it is yet in their possession, for the amount of their freight of the particular property, and is only co-extensive with the right to recover freight. If the contract of carriage has been performed, then the company is entitled to recover freight, and is, therefore, invested with a lien in law to the amount;<sup>2</sup> if, however, the contract of carriage has not been performed, or has been so illy performed as to inflict upon the owner or consignee an injury to the property, resulting in a loss as great or greater than the amount which would otherwise be due for freight, then no lien in law exists, as in such case no freight is due, and the consignee may maintain an action of replevin for the property. In the trial of such action of replevin, the claim of damages may be set up, instead of resorting to a cross action, by the owner of the goods, a proper basis being laid for the same in the pleadings, and thus the whole controversy and claims of the parties be settled in one and the same action. The Supreme Court of Vermont, BARRETT, J., in the leading case here cited, say: "There would seem to be no good reason why the liability of the carrier to the freighter for damage accruing, through his fault, in the carriage of the property, should not be asserted and determined by way of defense to his claim for freight, as well as by a cross action for such damage. Indeed, not only do the analogies of cases involving similar relations of subject-matter and parties justify it, but there are reasons peculiar to this particular class of cases that seem to render it peculiarly proper."<sup>3</sup>

And if the goods be warehoused by the company, at the place to which they were received to be carried, to await the owner's application for the same, the company have a right, after a rea-

<sup>1</sup>Stevens and another v. Boston & Worcester R. R. Co., 8 Gray, 262, 266; Clark v. The Lowell & Lawrence R. R. Co., 9 Gray, 231.

<sup>2</sup>Dyer v. The Grand Trunk R. W. Co., 42 Vt. 441; S. C. 1 Am. R. 350.

<sup>3</sup>Dyer v. The Grand Trunk R. W.

Co., 42 Vt. 441, 445; S. C. 1 Am. R. 350; Humphreys v. Reed, 6 Whart. 435; Cutting and others v. Grand Trunk R. W. Co., 13 Allen, 381; Boston & Maine R. R. Co. v. Brown and others, 15 Gray, 223.

sonable time for delivery of the same, to charge storage thereon, and a lien accrues to the company for the amount thereof, as against the particular goods upon which the charges accrue, for the payment of which the goods may be lawfully detained, until the charges for storage, and also for freights, if any, be fully paid.<sup>1</sup>

**29. Carriers of bonded goods.**—Carriers of goods which are subject to unpaid government duties, known to the carrier to be such, and being carried from one revenue district of the United States into another, are bound to deliver the same into a bonded warehouse; that is, to the bonded warehouse officer of the district or place whereto the goods are consigned, although directed to, or as belonging to, an individual personal consignee. It is the duty of the carrier, on the arrival of the goods in such cases at their destination, to notify the government authorities of such warehouse of their arrival, and to afford a reasonable time and opportunity for their reception and removal. If this be not done, and the goods are burned, the carrier is liable, although they were warehoused, for the rule in ordinary cases of individual consignees does not apply.<sup>2</sup>

**30. Carriers must be treated by shippers with good faith.**—Common carriers are not necessarily such in respect to money and bank bills, and are not compelled to carry them, unless for such enlarged compensation as shall reconcile them to the risk of the undertaking; for bank bills and money, in ordinary business parlance, do not come under the head of goods and chattels, or goods and freight.<sup>3</sup> But if common carriers of bank bills or money, they are entitled to be treated with good faith, and to be informed thereof, that they may have a corresponding premium or compensation for the carriage, by reason of the necessary additional care, and the risk incurred; and if not so informed, they are not liable for the loss thereof,<sup>4</sup> unless wantonly caused by the carrier.

**31. Contract to carry on time.**—A contract of a common carrier to carry goods within a specified time, is a contract with

<sup>1</sup> Ill. Cent. R. R. Co. v. Alexander and others, 20 Ill. 23, 29.

<sup>2</sup> Chi. & N. W. R. R. Co. v. Sawyer, 69 Ill. 285.

<sup>3</sup> Chicago & Aurora R. R. Co. v. Thompson, 19 Ill. 578.

<sup>4</sup> Chicago & Aurora R. R. Co. v. Thompson, 19 Ill. 578.

reference to the responsibilities which the law imposes upon such carriers in ordinary cases, so far as relates to the risk of the goods. The carrier assumes responsibility as to time; but the rule of liability for injury or loss is at common law. The company do not become absolute insurers of their safe delivery at all events; but are exempt if the goods be destroyed by the act of God or the public enemy, before the time of delivery expires. The exemption, in such case, covers not only their ordinary liability as carrier, but also any claim growing out of the contract, as for non-compliance in point of time.<sup>1</sup>

The making arrangements to run special fruit trains from fruit-growing districts to market, and holding out public notice thereof, and of the time to be made by such trains as to their arrival at market, is not regarded in law as creating a special contract, between the railroad corporations so holding out inducements and the shippers, to deliver absolutely within the advertised time. There is no greater or other obligation created thereby than that of common carrier. Time, in such case, is the object aimed at—but not of the obligation, except the expectancy—that, as in other cases of carriage, the carriers are bound to perform within a reasonable time. To make a time contract, there must be mutuality of obligation and express stipulation.<sup>2</sup>

Nor are the carriers liable in such cases for loss by natural decay of the property, unless there be unreasonable delay, as the cause of it, during transit; but they are, even by the rule of reasonable diligence, held to a stricter care and diligence than ordinary, on account of the natural tendency in the cargo to do so.<sup>3</sup> If there be mutual negligence, there can be no recovery, if ordinary care on the part of the plaintiff is wanting, which would have avoided the injury.<sup>4</sup>

In New Hampshire, it is holden that a contract for carriage, to be performed on a particular day, though oral, and without any special consideration more than the ordinary charges, is

<sup>1</sup> Strohn and another v. The Detroit & Mil. R. R. Co., 23 Wis. 126.

<sup>2</sup> Reed & Walker v. Phila., Wil. & Balt. R. R. Co., 3 Houst. 176.

<sup>3</sup> Reed & Walker v. Phila., Wil. & Balt. R. R. Co., 3 Houston, 176.

<sup>4</sup> Reed & Walker v. Phila., Wil. & Balt. R. R. Co., 3 Houston, 176;

Truax v. Phila., Wil. & Balt. R. R. Co., 3 Houston, 233. And though there be a through contract, where the line consists of several roads, yet one company is not liable for loss on the line of another: Truax v. Phila., Wil. & Balt. R. R. Co., *supra*.

binding; and that for a breach thereof, the damage is the difference in price of the article in the market to which it was consigned, on the day it should have arrived there, and on the day of its actual arrival.<sup>1</sup> And it is, moreover, holden in the same case, that if a sale of the goods be already contracted for by the consignor, for delivery at the place to which they are consigned in a given time, or such time as required immediate transportation, and the railroad company receive the goods with knowledge thereof, and agree, in view thereof, to carry them immediately, but instead of so doing, delay an unreasonable time, or for such a time as amounts to a breach of the contract for carriage, that the company will, moreover, be liable to special damages, if a basis be laid therefor in the pleadings, for such breach of contract; as, for instance, for the loss of sale, and for such other injury as will ordinarily follow a breach of contract under such special circumstances, including reasonable expenses incurred in looking up, caring for, and disposing of, the property, if, failing to arrive in proper time, the purchaser, by reason thereof, declined to take it, and the property be thrown back upon the consignor.<sup>2</sup>

**32. Seizure of goods on legal process—Destruction by public enemy.**—When property which is in the hands of a carrier for transportation, or is in actual course of transit in a carrier's hands, is seized upon legal process, such property is thereby placed in the custody of the law, if in the actual jurisdiction at the time, and an action at the suit of the consignor will not lie for such property, even after demand is made for the same; the action, to test the right, should be against the officer. Such, too, is the law, whether seized on process against the real owner, or against some one else, for of the ownership the judiciary, and not the carrier, is the judge; and the, too, though neither the consignor nor consignee be made a party to the proceedings.<sup>3</sup>

<sup>1</sup> *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455; S. C. 2 Am. R. 267.

<sup>2</sup> *Deming v. Grand Trunk R. R. Co.*, 48 N. H. 455; S. C. 2 Am. R. 267; *Griffin v. Colver*, 16 N. Y. 489, 494; *Humphreysville Copper Co. v. Vt. Copper Mining Co.*, 33 Vt. 92.

<sup>3</sup> *Drake on Attachments*, 2 ed., secs.

290, 350, 453; *Stiles v. Davis & Barton*, 1 Black. 101; *Kennedy v. Brent*, 6 Cranch, 187; *Verral v. Robinson*, 5 Tyrwhitt, 1069; *Burlingame v. Bell*, 16 Mass. 318; *Tillinghast v. Johnson*, 5 Ala. 514; *Blaisdell v. Ladd*, 14 N. H. 129; *Savannah, Griffin & N. Ala. R. R. Co. v. Wilcox*, 48 Ga. 432, 11 Am. Ry. Rep. 375.



And the same rule holds good if the seizure be by garnishment of the carrier;<sup>1</sup> subject, however, to the principles of the law as applicable to such case, in regard to local jurisdiction, and the rights of the carrier, when the property is somewhere *en route*, in actual course of transit, for which, see title Garnishment.

Although property taken from a common carrier by writ of attachment sued out against the consignee or owner of the property, is in that respect in the custody of the law, and is so placed by a superior force or governmental power, beyond the ability of the carrier to resist, and by reason of which he will be excused from its delivery while so remaining in legal custody<sup>2</sup> (and, as a sequence, for a reasonable time after restoration thereof to the carrier, in case it be restored), yet it does not follow, nor is it the law, that the wrongful attachment of property in the hands of the carrier, such as the taking of the property as the property of, and for a debt of, a different one than the real owner or consignee, will relieve the carrier from delivery of the same; the owner may nevertheless proceed against the carrier, and will have his legal remedy, leaving the carrier to pursue the property by defending the suit, or to seek his remedy by trespass, or other proceeding, against those thus wrongfully taking it.<sup>3</sup>

The process of attachment is not regarded as placing the property in the custody of the law, when belonging to one person, and taken in an attachment against another. The proceeding is a trespass, and an action lies, therefore, by the carrier from whom taken, if taken from a carrier, or an action of replevin may be maintained, except when such action of replevin will bring into conflict the state and federal authorities; and without regard to such conflict, trespass will always lie in such cases, which being for money damages against the person of the officer, and not adverse in any way to the proceeding, can not give rise to such a conflict.<sup>4</sup>

Nor are the cases of *Stiles v. Davis*, 1 Black, 101, or *Buck v. Colbath*, 3 Wallace, 334, as is sometimes supposed, in conflict

<sup>1</sup> *Stiles v. Davis & Barton*, 1 Black, 101.

<sup>2</sup> *Edwards v. The White Line Transit Co.*, 104 Mass. 159; S. C. 6 Am. R. 213.

<sup>3</sup> *Edwards v. The White Line Transit Co.*, 104 Mass. 159; *Howe v. Free-*

*man*, 14 Gray, 566; *Freeman v. Howe*, 24 How. 450.

<sup>4</sup> *Edwards v. The White Line Transit Co.*, 104 Mass. 159; *Howe v. Freeman*, 14 Gray, 566; *Freeman v. Howe*, 24 How. 450.

with this principle. The case of *Stiles v. Davis* was an action of trover for conversion of the goods, and not an action on the contract of transportation, and involved a mere failure to deliver, wherein there was no denial of the plaintiff's right, but merely a showing that the goods were taken and detained upon a writ of attachment; thus failing to show conversion, the action failed.<sup>1</sup>

Mere excess of business occasioned by required transportation of military supplies, and even so far taking control of the road by the military authorities of the government as to order government transportation to have a preference in point of time over other freights, where there is no absolute prohibition to transport property received by a railroad company for transportation, will not amount to such superior force, or *vis major*, as to excuse the company from loss occasioned by a failure to carry property so received within a reasonable time.<sup>2</sup> Only the act of God or of the public enemy will amount to such superior force as to excuse performance in the carriage of property by a common carrier.<sup>3</sup> And though the public enemy so far interfere with property, while being transported, as to remove the same from the cars, when they have seized upon the latter, yet that circumstance alone will not release the company from liability, if, without further cause from such enemy, the property be destroyed or lost. In case of such removal, it is the duty of the company to care for the property, and to make every reasonable effort to preserve it; and if not so cared for, and the same be lost, the company are liable. In such case, the proximate cause of loss is the subsequent neglect to take care of the same, and therefore the loss falls upon the company.<sup>4</sup>

<sup>1</sup> *Stiles v. Davis*, 1 Black, 101.

<sup>2</sup> *Illinois Cent. R. R. Co. v. McClellan*, 54 Ill. 58; S. C. 5 Am. R. 83.

<sup>3</sup> *Porter v. Chi. & Rock Island R. R. Co.*, 20 Ill. 407; Ill. Cent. R. R. Co. v.

*McClellan*, 54 Ill. 58; Ill. Cent. R. R. Co. v. *Frankenberg*, 54 Ill. 88; S. C. 5 Am. R. 92.

<sup>4</sup> *The Cent. Line of Boats v. Lowe*, 50 Geo. 509.

## CHAPTER LVII.

### BILL OF LADING OR RECEIPT FOR GOODS TO CARRY.

	Section.		Section.
It is the common carrier's contract to carry and deliver . . .	1	Effect of the words "in good condition" . . . . .	5
Negotiable character thereof . . .	2	Limitation of carrier's liability in bill of lading . . . . .	6
Effect of, between the original parties . . . . .	3	Acceptance of bill of lading by shipper . . . . .	7
Effect of, as to third persons . . .	4		

#### 1. It is the common carrier's contract to carry and deliver.—

The execution and delivery of a bill of lading or receipt by the carrier to the consignor, is the ordinary manner of contracting to carry and deliver goods and property consigned for carriage.<sup>1</sup> The custom of railroad carriers in this respect is derived from the common law usage and law of carriers. The usual and more proper course is to execute the same in three, or triplicate, originals; one of which is retained by the carrier, one delivered to the consignor, and the other sent or to be forwarded to the consignee or his agent.<sup>2</sup> These documents should set forth the names of the consignor and consignee, the place of consignment or receipt of the goods for carriage, the description, quantity and marks of the property or parcels, as also the price paid or to be paid as freight.<sup>3</sup>

By force thereof, in law, the carrier becomes liable to deliver the goods at the place of destination, if on his own route, to the consignee, on payment of the freight by him, if not prepaid, in like good condition as received; except loss or injury incurred from the act of God, the public enemy, or the *vis major* of judicial interference, and by force of process from the courts of the country. If, however, the goods be consigned to a connecting line, or otherwise, it is then the obligation of the carrier to

<sup>1</sup> 3 Kent's Coms., 2 Ed., 207.

<sup>2</sup> 3 Kent's Coms., 207.

<sup>3</sup> 3 Kent's Coms., 207.

deliver on his own line, or at the terminus thereof, as in the bill of lading or receipt for the goods he is directed.<sup>1</sup>

This obligation, however, in regard to loss or injury, does not extend to such as are incurred by reason of bad packing, or by reason of the goods being put up in bad condition, or of their innate character tending to result in their own decay, loss or injury.

These several original bills of lading or receipts, though each a complete contract within itself, constitute but one contract on the part of the railroad company or carrier. They ought therefore to be characterized on their face as counterparts, so as to avoid falling into different hands, or creating conflicting interests; for in the event that the parts held by the consignor or consignee be transferred to different persons, a conflict arises as to the right to receive the goods. Under such circumstances, Justice KENT lays it down as the rule of law, that where the equities are no more than equal, or are equal, the right is in the one who first received the indorsement, or, we may add, the transfer; citing therefor the case of *Caldwell v. Ball*, 1 Term R. 205, and *Bell's Com.* 545.<sup>2</sup>

A carrier may not deliver or send forward goods to a supposed consignee, when unaccompanied by instructions, bill of lading or receipt, to whom, as consignee, and where, to be delivered, or to what place to be forwarded, if received to be forwarded; nor will mere initial letters of a consignee, marked thereon, be a sufficient guide to enable the carrier to act with safety, or to compel him to assume the responsibility, under such circumstances.<sup>3</sup>

**2. Negotiable character thereof.**—These instruments are ordinarily negotiable.<sup>4</sup> Their transfer carries with it, as against the consignee or consignor who transfers the same, the right to receive the property therein described, upon the terms thereof as to payment of freight;<sup>5</sup> and the mere delivery of a bill of lading, or such receipt, with intent to pass the ownership of the goods, has that effect, although it be not payable to assigns or to

<sup>1</sup> *Hinckley v. New York Cent. & Hudson River R. R. Co.*, 56 N. Y. 429; *S. C.* 6 Am. R. W. Rep. 90; *Johnson v. N. Y. Cent. R. R. Co.*, 33 N. Y. 610.

<sup>2</sup> 3 Kent's Coms., 2d ed., 207.

<sup>3</sup> *Finn v. The Western R. R. Co.*, 102 Mass. 283.

<sup>4</sup> 3 Kent's Coms., 2d ed., 207.

<sup>5</sup> 3 Kent's Coms., 2d ed., 207.

bearer; or if payable to assigns of the consignor, yet it be not assigned or indorsed.<sup>1</sup>

**3. Effect of, as between the original parties.**—A bill of lading or receipt, given for goods to be carried, if taken at the time the goods are delivered to the carrier, is evidence of the contract between the parties, and can not be varied in its terms by parol proof of any agreement or understanding had or made prior to the execution and delivery thereof, except for mistake or fraud; the execution and delivery thereof is in law, in the absence of fraud or mistake, regarded as embodying the ultimate and true agreement, and estops the parties from going behind it.<sup>2</sup>

Yet a bill of lading is, like other receipts, open to explanation as to the amount received, and the carrier may show that the actual amount which came into his hands was different from that stated therein;<sup>3</sup> this is as between the original parties—the consignor, the consignee, and the company. There is an exception, however, to the rule, as to third persons, who, by purchase, or by advancement of money or credit, have become interested on the faith thereof.<sup>4</sup> And though the consignee may recoup from the freight earned the value of any loss properly chargeable to the carrier, yet he is not so entitled as for any deficiencies between the amount delivered to him and that specified in or receipted for by the bill of lading, if the carrier can show that he actually

<sup>1</sup> *City Bank v. The Rome, Watertown & Ogdensburgh R. R. Co.*, 44 N. Y. (5 Hand), 136, 139; *Mich. Cent. R. R. Co. v. Phillips*, 60 Ill. 190; *Parsons on Mercantile Law*, 346; 2 Kent, 207. "It is the law (says HUNT, Commissioner, in *City Bank v. The Rome, Watertown & Ogdensburgh R. R. Co.*, *supra*.) that a carrier or a warehouseman is bound to ascertain whether a bill of lading was delivered to the shipper; and if delivered, he must retain the property until it is demanded by one claiming under that title." And so by the English authorities: *Howard v. Shepherd*, 9 Man., Gr. & Scott, 296; *Tindal v. Taylor*, 4 Ellis & Bl. 219.

<sup>2</sup> *Long v. The New York Cent. R. R. Co.*, 50 N. Y. (5 Sickels), 76; *Bostwick v. Balt. & Ohio R. R. Co.*, 55 Barb. (N. Y.), 137; *Strong v. The Grand Trunk R. R. Co.*, 15 Mich. 206; *McMillan et al. v. The Mich. S. & N. Indiana R. R. Co.*, 16 Mich. (3 Jennison), 79, 113, 114; *Great Western R. R. Co. v. McDonald*, 18 Ill. 172; *Little Miami, C. & X. R. R. Co. v. Dodds*, 1 Cincinnati Superior Court Reports, 47.

<sup>3</sup> *Strong v. Grand Trunk R. R. Co.*, 15 Mich. 206, 215; *Great Western R. R. Co. v. McDonald*, 18 Ill. 172.

<sup>4</sup> *Strong v. Grand Trunk R. R. Co.*, 15 Mich. 206, 215.

delivered all that which he received.<sup>1</sup> And as a carrier has a lien on the property carried for his freight earned, an intermediate consignee, who receives the property subject to the charge of such lien, is liable to an action for the amount, if he refuse to pay the same; and thus may not, even by custom, deduct for deficiencies.<sup>2</sup>

But when a verbal agreement for the transportation of goods has been made, and is so far acted upon as to receive and despatch the goods, so that the shipper has parted with all control thereof, then a bill of lading thereafter given by the company, and received by the shipper, for the goods for transportation, embodying different terms, less burdensome to the carrier, than those contained in the verbal agreement, and without a knowledge of such deviation on his part, is not obligatory, as to such variation of terms, upon the shipper, unless the same is seen and known to and assented to by him.<sup>3</sup>

4. **Effect of, as to third persons.**—Though bills of lading and receipts given for goods to be carried are, under certain circumstances, subject to explanation or change by oral proof, as between the original parties—that is, as between the consignor or consignee and the carrier—yet such is not the case as between the carrier and a third person or persons, standing in the position of *bona fide* assignee thereof. Such persons are entitled to enforce the terms of the instrument, and the carrier, as against them, is estopped to claim a different effect therefor than is shown upon its face.<sup>4</sup>

<sup>1</sup> Strong *v.* The Grand Trunk R. R. Co., 15 Mich. 206; Bissel *v.* Price, 16 Ill. 408; Bowman *v.* Hilton, 11 Ohio, 303; Ryder *v.* Hall, 7 Allen, 456.

<sup>2</sup> Strong *v.* The Grand Trunk R. R. Co., *supra*.

<sup>3</sup> Bostwick *v.* The Baltimore & Ohio R. R. Co., 45 N. Y. (6 Hand), 712. If, however, the party expressly assent to such change of terms, such assent will have the effect, and will operate to, change the original verbal terms of shipment: *Ib.* 716. But *quære*, if valid where there is no consideration given or received for the change of contract? Would a release be valid

without consideration; and is the change made anything more or less than a release of a portion of the liability of the company?

<sup>4</sup> McMillan *et al.* *v.* The Mich. S. & N. Indiana R. R. Co., 16 Mich. 79, 113. And where a railroad company issues two original bills of lading for a single consignment, one of which is negotiated, and the goods are delivered on the other, it will be liable to the holder of the negotiated bill, upon the principle that where one of two innocent parties must suffer for the wrongful act of another, he by whose act or default the wrong is rendered

5. **Effect of the term, "in good condition."**—The effect of the term or words, "in good condition," "in good order," and others of similar import, in a bill of lading or receipt for goods to be carried, is not such as will, between the original parties in interest, prevent the carrier from going behind the same, and showing by parol proof that such was not true in point of fact.<sup>1</sup> Though the use of these terms is *prima facie* evidence that such is the condition of the goods, yet it is well settled that it is a matter which may be inquired into, and the carrier is not thereby estopped from making proof, by parol, of injury thereto before coming to the possession of the carrier, or of condition tending in itself to ruin and decay, or leakage or loss.<sup>2</sup> Indeed, the better authority seems to be, that where the reference is to packages, boxes, or other things, whose contents are not perceptible to the sight, or capable of being examined, or being so, are not examined into by the carrier, the term "in good order" is to be understood to have reference to the outside, and not to the condition of the contents, and that, as to the latter, the *onus*, in case of question, is upon the shipper, to prove its good condition when delivered for carriage.<sup>3</sup>

6. **Limitation of carrier's liability in bill of lading.**—Though the policy of the law does not allow railroad corporations, acting as common carriers, to make and enforce terms or rules of shipment and carriage limiting their common law liability,<sup>4</sup> nor even the making of special contracts limiting their liability, as against the result of their own negligence or wrong,<sup>5</sup> yet it

possible must be that one: *Wichita Savings Bank v. Atchison, Topeka & Santa Fe R. R. Co.*, 20 Kans. 519, 20 Am. Ry. Rep. 299. And if the company issue bills of lading for more merchandise than is shipped, they will be estopped from denying the receipt thereof, as against such assignee: *Sioux City & Pacific R. R. Co. v. First Natl. Bank of Fremont*, 10 Neb. 556; S. C. 1 Am. & Eng. R. R. Cas. 278.

<sup>1</sup> *Blade et al. v. Chicago, St. Paul & Fond du Lac R. R. Co.*, 10 Wis. 4; *Ship Howard v. Wissman*, 18 How. 231; *Ill. Cent. R. R. Co. v. Cowles*, 32 Ill. 116; *Chicago & Alton R. R. Co.*

*v. Benjamin*, 63 Ill. 283; S. C. 7 Am. R. W. Reps. 392; *Porter v. Chicago & North Western Ry. Co.*, 20 Ia. 73.

<sup>2</sup> *Chicago & Alton R. R. Co. v. Benjamin*, 63 Ill. 283; S. C. 7 Am. R. W. Reps. 392.

<sup>3</sup> *Clark v. Barnwell*, 12 How. 272.

<sup>4</sup> *McMillan et al. v. The Mich. S. & N. Indiana R. R. Co.*, 16 Mich. 79.

<sup>5</sup> *Welch v. The Boston & Albany R. R. Co.*, 41 Conn. 333; S. C. 6 Am. R. W. Reps. 95; *N. Y. Cent. R. R. Co. v. Lockwood*, 17 Wall. 357; *Nashville & Chattanooga R. R. Co. v. Jackson*, 6 Heisk. 271, 12 Am. Ry. Rep. 54.

does not prevent the making of special contracts, evidenced by bill of lading or otherwise, limiting their liability for losses and injury, except as against their own negligence or wrong act; but on the contrary, such agreements, voluntarily or freely and knowingly entered into on the part of shippers, whatever or however small the consideration therefor may be, if not in itself illegal, will be enforced, in the absence of mistake or fraud, and where there is no statutory law prohibiting the same.<sup>1</sup>

In the case cited from 49 Ind., *St. Louis & S. E. Ry. Co. v. Smuck et als.*, *supra*, there was a shipment of wheat from St. Louis, over the South Eastern Railway, for Cannelton, Indiana. The bill of lading contained a clause exempting the railroad company from losses occurring on the lakes or rivers, not attributable to its negligence. The wheat arrived safely at Evansville, *en route*, from which place it was, in the usual course of transportation, to proceed by boat. The company placed the wheat upon its wharf boat to await the arrival of the packet, and for transportation thereon. Whilst so in waiting on the wharf boat, the wharf boat sank, from cause not shown. The railroad company were held liable for the loss, on the ground, as the court decided, that exemption from losses on river or lake meant in course of transportation thereon, and that the exemption had not attached at the time of the loss; for that the property was merely on the river as a convenient place of storage, and not so in course of transit.

Limitation or exemption from liability of the carrier of goods to a connecting line, to be by the latter forwarded, inures as well to the latter as the former.<sup>2</sup> But no limitation or exemption is permitted as against injuries or loss arising from the carrier's own negligence, on either the one line or the other.<sup>3</sup>

<sup>1</sup> *McMillan et al. v. Mich. S. & N. Indiana R. R. Co.*, 16 Mich. 79; *Welch v. The Boston & Albany R. R. Co.*, 41 Conn. 333; S. C. 6 Am. R. W. Reps. 95; *Mich. S. & N. Indiana R. R. Co. v. Heaton*, 37 Ind. 443; *St. Louis & S. E. Ry. Co. v. Smuck et al.*, 49 Ind. 302; S. C. 8 Am. R. W. Reps. 209; but by the case last cited, it is ruled that such limitation is to be strictly construed.

<sup>2</sup> *Manhattan Oil Co. v. Camden & Amboy R. R. & Trans. Co.*, 54 N. Y. 197; S. C. 6 Am. R. W. Reps. 189.

<sup>3</sup> *Condict et al. v. The Grand Trunk R. W. Co.*, 54 N. Y. 500; S. C. 6 Am. R. W. Reps. 410; *McMillan et als. v. Mich. S. & N. Indiana R. R. Co.*, 16 Mich. 79; *St. Louis, Kansas City & Northern Ry. Co. v. Piper*, 13 Kans. 505, 8 Am. Ry. Rep. 204.



**7. Acceptance of bill of lading by shipper.**—In the language of DAY, Justice, a bill of lading, like a deed poll, and many other classes of contracts, is signed by one party only, and in such case the evidence of assent upon the part of the other party usually consists in his accepting and acting upon it; and the evidence of assent derived from his acceptance of the contract without objection is usually conclusive.<sup>1</sup> It seems to be a well settled rule, that the acceptance of a bill of lading without objection, and clear of fraud or mistake, with limitations of liability in it not inconsistent with the law, will be binding on the shipper. Mere oversight is no excuse; the courts can not guard a party against his own carelessness.<sup>2</sup> The principle here laid down is not to be understood as applying to cases where the goods had been received, and were already in transit, at the time of delivering the bill of lading, without any oral indication previously made of any intended limitation, as in the case of *Bostwick v. Balt. & Ohio R. R. Co.*, 45 N. Y. 712 (*supra*, No. 2 of this chapter); in such cases the shipper may be allowed to infer, on receiving the instrument, that it is in accordance with the general rules of law upon the subject; and, indeed, has no alternative between taking what is offered him or no evidence of his consignment at all, as the goods have passed out of his control.

In Illinois<sup>3</sup> it has been held, but, as Justice DAY pertinently remarks,<sup>4</sup> contrary to the weight of authority, that the question of receiving with knowledge of the limitation and of assent thereto are for the jury to decide.

<sup>1</sup> *Mulligan v. The Ill. Cent. Ry. Co.*, 36 Iowa, 181; S. C. 2 Am. R. W. Reps. 322.

<sup>2</sup> *Mulligan v. The Ill. Cent. Ry. Co.*, 36 Iowa, 181; *McMillan v. Mich. S. & N. Ind. R. R. Co.*, 16 Mich. 80; *Kallman v. U. S. Express Co.*, 3 Kansas, 205; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 491; *Morrison v.*

*Phillips & Colby Const. Co.*, 44 Wis. 405, 19 Am. Ry. Rep. 312; *Merchants' Disp. & Transp. Co. v. Moore*, 88 Ill. 136, 21 Am. Ry. Rep. 293.

<sup>3</sup> *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140.

<sup>4</sup> *Mulligan v. Ill. Cent. Ry. Co.*, 36 Iowa, 181; S. C. 2 Am. R. W. Reps. 322, 329, 330.

## CHAPTER LVIII.

### CONSIGNOR AND CONSIGNEE.

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Conditional or special consign- ment . . . . .	2	Suit for lost goods; in whose name to be brought . . . . .	5
When terms of consignment may be waived . . . . .	3	Limited liability . . . . .	6
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**1. General consignment.**—A general consignment of goods to be carried is, as between the consignor and consignee, *prima facie* evidence of ownership of the goods in the consignee, and of his right to the receipt and possession thereof at the place of delivery to which they are consigned, upon payment of the freight and other charges legally incident to the transportation thereof, or for which they are legally liable.<sup>1</sup> These rights of the consignee, however, are subject to the consignor's right of stoppage *in transitu*, for proper cause, up to the time of the actual delivery of the goods to the consignee.<sup>2</sup>

But the presumption of ownership in the consignee is not conclusive, to the extent of preventing the contrary thereof being shown under suitable circumstances;<sup>3</sup> as, for instance, if the goods be seized as the property of the consignee, it may nevertheless be shown, if such be the fact, that the real ownership is in the consignor.<sup>4</sup> And so, in like manner, wherever the real ownership comes in question in a judicial proceeding between these parties—that is, the consignor and consignee themselves—or between them or one of them and a third party, the real own-

<sup>1</sup> *McEwen v. The Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368; S. C. 5 Am. R. 216; *Sawyer v. Joslin*, 20 Vt. 172, 178.

<sup>2</sup> *McEwen v. The Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368; S. C. 5 Am. R. 216, 220;

*Sawyer v. Joslin*, 20 Vt. 172.

<sup>3</sup> *McEwen v. The Jeffersonville, Madison & Ind. R. R. Co.*, 33 Ind. 368; *Johnson v. New York Cent. R. R. Co.*, 33 N.Y. 610; *Sawyer v. Joslin*, 20 Vt. 172, 178.

<sup>4</sup> *Sawyer v. Joslin*, 20 Vt. 172, 178.

ership of the property, if in question, may be shown, subject to the usual rules of ownership.<sup>1</sup> For sometimes the consignee is but the agent, factor, or even the mere clerk or servant of the consignor,<sup>2</sup> and yet, in the course of confidential trust and business purposes, the consignment to him is general, there being no need of restrictive clauses in a bill of lading between persons bearing such relations toward each other as are in some cases otherwise resorted to for the safety of the consignor, and are termed conditional or special consignments, and which will next be considered.

The person to whom the goods shipped are to be ultimately delivered, without restrictive words as to ownership, is the real consignee, and not the one to whose care they are directed. Or, in the language of ROBERTSON, J.: "When goods are to be delivered to the care of one person for another as owner, the latter is the consignee."<sup>3</sup>

Where the right of stoppage *in transitu* exists in the vendor of goods consigned to a railroad company to be carried, and that right is shown to have been duly exercised, it will override the rights of attaching creditors, whose writs of attachment are levied upon the same goods.<sup>4</sup> If, upon such attachment proceedings, the vendors intervene, and succeed in establishing their right to stop the goods *in transitu*, and before final determination thereof the goods be sold by the officer, the proceeds of the sale will be adjudged to such vendors, and so ordered by the court to be applied, to their full extent, and the attaching creditors will be taxed with the costs of the proceeding.<sup>5</sup>

The right of stoppage *in transitu* is held, in Louisiana, to exist as well where the insolvency of the buyer occurred before, as after the sale of the goods, if the vendor is ignorant thereof at the time of selling and shipping the same. The supreme court of that state, in the leading case above cited, review the doctrine, and come to the conclusion that such is the more correct principle deducible from the authorities.<sup>6</sup>

<sup>1</sup> Sawyer v. Joslin, 20 Vt. 172, 178.

<sup>2</sup> McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co., 33 Ind. 368; S. C. 5 Am. R. 216, 219.

<sup>3</sup> Jeffersonville R. R. Co. v. White, 6 Bush, 251.

<sup>4</sup> Blum & Co. v. Marks, 21 La. An. 268.

<sup>5</sup> Blum & Co. v. Marks, 21 La. An. 268.

<sup>6</sup> Blum & Co. v. Marks, 21 La. An. 268.

Where the plaintiff contracted to purchase cider, for which he was to and did furnish casks, which were duly filled and delivered at the station, but were 'not marked, it was held that the title thereto remained in the vendor, and the liability of the railroad company was that of a warehouseman.<sup>1</sup> Under a similar contract made with another person, the cider was delivered properly marked. It was held the railroad company was liable to the vendor for the loss of the cider by fire; and that the subsequent acceptance by the plaintiff (the vendee) of other cider under the contract, and payment for that destroyed, did not relate back so as to vest the title in him at the time of the loss, but operated as an assignment of the cause of action, which was permitted to be set up by amendment of the complaint at the trial.<sup>2</sup> Where, however, the shipper was under contract to erect a building for the consignees, living in another town, and furnish it with machinery, for a gross sum, the consignees paying freight on the machinery, it was held the shipper might maintain an action for injury to it in transit.<sup>3</sup>

**2. Conditional or special consignment.**—So a special or conditional consignment of goods to be carried is *prima facie* evidence of ownership thereof in the consignee, if such ownership is not negatived in effect by the terms thereof, and is also *prima facie* evidence of his right to receive and possess the same at the designated place of delivery to which they are directed (subject, however, to the right of stoppage *in transitu*), upon payment of the freights and charges legally incident to their transportation and keeping, and upon performance of the conditions or compliance with the terms of the bill of lading, and not otherwise; as where a consignment was made, to be delivered to the consignee on payment of freight and presentment by him of the duplicate of the bill of lading, the property being delivered to the consignee without presentation of the duplicate of the bill of lading, the company were held liable for the same in an action by the consignor. It is the right of the shipper, say the court, in naming a consignee, to subject the delivery of the goods to him to any condition the consignor may desire. In such case, the carrier is the agent of the shipper, and it is his duty

<sup>1</sup> O'Neill v. New York Central & Hudson River R. R. Co., 60 N. Y. 138, 10 Am. Ry. Rep. 121.

<sup>2</sup> *Ibid.*

<sup>3</sup> Ross v. Troy & Boston R. R. Co., 49 Vt. 364, 17 Am. Ry. Rep. 203.

"to observe the instructions of his principal. And when he disregards them, he assumes a responsibility by which he himself must abide."<sup>1</sup>

This stipulation in the bill of lading, for delivery on payment of freight, will so far bind the carrier, in case the consignee be really the owner of the goods, as to discharge the consignor from liability for the freight, in case it be not paid by the consignee, and yet the goods be delivered to him;<sup>2</sup> but if the consignment be, as between the two, for the benefit of the consignor, and thus the consignee be but the agent, in fact, of the consignor, to receive the goods and pay the freight, then if this freight be not paid by the consignee, the consignor is liable therefor to the carrier, and will be made to pay the same.<sup>3</sup>

The reason of the rule, and the necessity of enforcement thereof, requiring the terms of the bill of lading to be complied with, as a condition to the discharge of the carrier, are clearly seen in cases of consignment, as a sale to the consignee, covered by a corresponding draft in favor of some third person or institution, accompanied by the duplicate of the bill of lading, to be delivered to the consignee as evidence of his right to receive the goods, upon payment of the draft. In such case, non-payment of the draft for the purchase money requires the withholding of the duplicate bill of lading by the carrier, as the only means of protection to the consignor, so as to prevent the delivery of the goods unpaid for.<sup>4</sup> And so as to a consignment, as is customary, by express, accompanied by an account or draft for the purchase money of the article consigned, to collect on delivery; the receipt of property thus consigned subjects the carrier to compliance with the terms thereof at his peril.<sup>5</sup>

Though, as has hereinbefore been stated in this connection, the bill of lading, on a general consignment, is *prima facie* evidence of property in the consignee, and of his right to the goods, yet it is by no means conclusive; for in many cases the

<sup>1</sup> *McEwen v. The Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368; S. C. 5 Am. R. 216; *Johnson v. N. York Cent. R. R. Co.*, 33 N. Y. 610; *Steamboat John Owen v. Johnson*, 2 Ohio St. 142.

<sup>2</sup> *McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind.

368.

<sup>3</sup> *McEwen v. Jeffersonville, Madison & Ind. R. R. Co.*, 33 Ind. 368.

<sup>4</sup> *McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368.

<sup>5</sup> *McEwen v. Jeffersonville, Madison & Ind. R. R. Co.*, 33 Ind. 368.

consignee is but the agent of the consignor, and receives the goods for his benefit, and, therefore, subject to his control.<sup>1</sup>

If the consignee decline to receive the goods upon the terms of consignment, it becomes the duty of the carrier to safely warehouse them for the consignor,<sup>2</sup> and perhaps to notify him thereof.

Though a consignment be to the consignee as commission merchant, of goods to sell on commission for the benefit of the consignor, yet if the consignor contemporaneously draw on the consignee for funds on the credit of the consignment, accompanying the draft with the bill of lading or shipping receipt for the goods, such special property in the goods is thereby vested in the consignee as will take precedence over a levy thereon as for a debt of the consignor, made after the acceptance of the draft by the consignee;<sup>3</sup> this, too, notwithstanding there be no consideration for the draft as between the drawer and payee, if it be paid or accepted in good faith by the consignee.<sup>4</sup> The bill of lading or shipping receipt, in such cases, is a symbol of the goods: and the delivery thereof, with intent to transfer the property or an interest therein, is in law a symbolical delivery of the goods, vesting the property in the payee of the draft, for the use of the consignee, in case of his acceptance and payment, in due time thereafter, of the draft; and such acceptance confers a lien for whatever is thereafter in good faith paid on the draft.<sup>5</sup>

**3. When conditions or terms of consignment may or may not be waived.**—And though such requirements, if any, as are merely for the security or benefit of the consignee, may be waived by him, on delivery of the property, and the delivery will in that respect be legal, and will, if otherwise right, discharge the carrier,<sup>6</sup> yet stipulations in the bill of lading tending to the security of, and for the benefit of, the consignor, may not be waived by the consignee, or disregarded by the carrier; and

<sup>1</sup> *McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368.

<sup>2</sup> *McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368.

<sup>3</sup> *Peters et al. v. Elliott et al.*, 78 Ill. 321.

<sup>4</sup> *Peters et al. v. Elliott et al.*, 78

Ill. 321.

<sup>5</sup> *Mich. Cent. R. R. Co. v. Phillips et al.*, 60 Ill. 190; *Gibson v. Stevens*, 8 How. 384; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *Holbrook v. Wight*, 24 Wend. 169.

<sup>6</sup> *McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co.*, 33 Ind. 368.

if disregarded, and delivery be made without their performance or fulfillment, the carrier becomes liable, in an action for the property, to the consignor.<sup>1</sup>

**4. Direction and misdirection of the goods.**—It devolves upon the shipper or consignor of goods to so mark their destination and course of carriage as shall leave no ambiguity or uncertainty, not only as to what is the place of destination, but also as to where such place is situated, with such reasonable degree of certainty as shall leave no ground for mistake or error in the carriage thereof, and as shall plainly indicate to the carrier, not only the name of the consignee and place of destination, but also where the same is situate; and if the direction be such as to mislead, or be liable to mislead, the carrier, or as not sufficiently to protect him against error, and the goods be carried to a wrong place, and by reason thereof be lost, the carrier will not be responsible for the same.<sup>2</sup>

But when goods delivered for transportation are properly marked, and they be misdirected by the company's agent in the way bill—as, for instance, the goods being plainly marked and consigned to “J. Weil & Brothers,” and they be billed and sent by the company to “T. Weil & Company”—and being called for at the place of destination after their arrival by the proper consignees, and not by them obtained, they remain in the possession of the company and are afterward destroyed by fire, the company are liable for the loss.<sup>3</sup> In the case here cited, the Supreme Court of Wisconsin, COLE, Justice, say: “It seems to us a very plain ground of liability, to hold the company responsible for the negligence and mistake of the agent in failing to enter upon the way-bill the names of the proper consignees.”<sup>4</sup>

Railroad companies, as common carriers, are not chargeable with knowledge of the arbitrary or abbreviated private marks of consignees of goods confided to them for carriage, by the mere fact of having, on previous occasions, sometimes carried goods thus marked to the same parties; and therefore when articles arrive at their

McEwen v. Jeffersonville, Madison & Indianapolis R. R. Co., 33 Ind. 368; Johnson v. N. York Cent. R. R. Co., 33 N. Y. 610.

<sup>2</sup> Congar v. The Chi. & Northwestern Ry. Co., 24 Wis. 157; S. C. 1

Am. R. 164.

<sup>3</sup> Meyer v. Chi. & Northwestern R. W. Co., 24 Wis. 566; S. C. 1 Am. R. 207; The Jeffersonville R. R. Co. v. Cotton, 29 Ind. 498.

<sup>4</sup> 24 Wis. 567.

destination with no other evidences of ownership thereon; it is not only the privilege but the duty of the company having charge thereof, to store them until called for and identified;<sup>1</sup> and being so stored, the relation of carrier ceases, and that of warehouseman takes its place. A corporation has no memory, and is not chargeable with that of its agents, at least until their memory is shown to have continued in regard to the transaction; and moreover, as the agents are constantly liable to change, identity of agency must also be shown, as well as recollection in regard to former transactions, in order to charge the company.<sup>2</sup>

5. **Suit for loss of goods—In whose name to be brought.**—Notwithstanding the consignor has a lien of an equitable nature, and the right of stoppage *in transitu* as to the goods, in certain cases, during their transit, yet in case the goods be lost, the right of action therefor is in the consignee, and the action must ordinarily be brought in his name;<sup>3</sup> and this, too, whether the goods be sold on a credit or for cash payment, for by implication of law the consignee is *prima facie* the owner, and although it may be shown otherwise as between the consignor and consignee, yet in the light of the law, if nothing is shown to the contrary by way of special consignment, the consignee is to be regarded by the carrier as owner.<sup>4</sup>

Railroad companies are bound to carry for all alike, and the obligation of carriage, as to the consignee, is to deliver to him the goods at their appointed destination, in a reasonable time, from which only the act of God or of the public enemy, or the conduct of the owner, will relieve the company;<sup>5</sup> but the company is not bound to deliver at the consignee's place of business.<sup>6</sup> Temporary obstructions of carriage, however unforeseen,

<sup>1</sup>The Great Western Ry. Co. of Canada v. Wheeler, 20 Mich. (2 Clarke), 419.

<sup>2</sup>Great Western Ry. Co. of Canada v. Wheeler, 20 Mich. (2 Clarke), 419.

<sup>3</sup>Sawyer v. Joslin, 20 Vt. 172, 181; Webb v. Winter, 1 Cal. 417; Griffith v. Ingledew, 6 Sergt. & R. 429; Southern Exp. Co. v. Caperton, 44 Ala. 101; Pennsylvania Co. v. Holderman, 69 Ind. 18; S. C. 1 Am. and Eng. R. R. Cas. 285.

<sup>4</sup>Sawyer v. Joslin, 20 Vt. 172, 181.

<sup>5</sup>Vicksburg & Meridian R. R. Co. v. Ragsdale, 46 Miss. 458.

<sup>6</sup>Vicksburg & Meridian R. R. Co. v. Ragsdale, 46 Miss. 458; New Orleans, Jackson & Great Northern R. R. Co. v. Tyson, 46 Miss. 729. But if it be the custom to give notice of the arrival, it must do so, or be liable for loss by detention; but not as for the goods: *Id.*



and therefore not reasonably required to be provided for, do not amount to a breach of such obligation; but the duty of performing must be resumed, in good faith, as soon as the temporary cause of delay is so obviated as to render it practicable to perform.<sup>1</sup>

It results from this obligation that the right of action, as a general principle, for a breach of the contract for the transportation of goods, is in the consignee; for that he is regarded in law as the *prima facie* owner of the property, or else as having a special ownership therein.<sup>2</sup> But this presumption of law may be rebutted, and the ownership be proven to be in the consignor, when such is the case; and in such case he may maintain the action,<sup>3</sup> unless, we will add, compensation has been made to the consignee by the company for the same, without notice of the rights of the consignor; for if the law regards the consignee as owner, then it follows that he may be treated as such.

Damages in actions for breach of the contract of affreightment, in not delivering in a reasonable time, do not include or consist in loss of profits, unless ascertained to an actual certainty, and only then in case of notice to the company at the inception of the contract, or reasonable inference thereof, from the nature of the transaction, that such damage would ensue from failure to perform.<sup>4</sup> Such as naturally results from the breach, in case liability is made out, may be proven under general pleadings; but special damages, or causes thereof, must be set forth in the pleadings.<sup>5</sup> And contracts in Mississippi limiting liability are prohibited by statute; and the inhibition is held to be constitutional.<sup>6</sup>

<sup>1</sup> Vicksburg & Meridian R. R. Co. v. Ragsdale, 46 Miss. 458.

<sup>2</sup> The East Tenn. & Geo. R. R. Co. v. Nelson, 1 Cold. 272.

<sup>3</sup> The East Tenn. & Geo. R. R. Co. v. Nelson, 1 Cold. 272. Such ownership must be alleged: Penn. Co. v. Holderman, *supra*.

<sup>4</sup> Vicksburg & Meridian R. R. Co. v. Ragsdale, 46 Miss. 458; East Tenn. & Geo. R. R. Co. v. Nelson, 1 Cold. 272. But if there be a special contract for delivery on time, there is then liability for expected profits, if it be

shown that they would have been realized if there had been timely delivery, and that they were lost by reason of the delay: East Tenn. & Geo. R. R. Co. v. Nelson, *supra*.

<sup>5</sup> Vicksburg & Meridian R. R. Co. v. Ragsdale, 46 Miss. 458.

<sup>6</sup> Mobile & Ohio R. R. Co. v. Franks, 41 Miss. 494. Railroad companies are held in that state to a common law liability as common carriers, irrespective of contracts in limitation thereof or exemption therefrom: *Ib*.

But notwithstanding this general rule, yet it is a principle of law equally obligatory, that the real party in whom the actual legal interest is vested may sue for loss or injury of the same;<sup>1</sup> and, therefore, the real owner may in some cases show such ownership and maintain his action, instead of the consignee or *prima facie* owner of the property.<sup>2</sup> And the company can not restrict the right of action to cases wherein a claim for the loss is made within a given number of days; it is against the policy of the law to allow a party to make limitations of time for himself.<sup>3</sup>

In the case of *Sanford and another v. The Housatonic Railroad Company*, the Supreme Court of Massachusetts hold that the proper plaintiff, in an action against a common carrier for the loss of goods consigned to be carried, and when received by the consignee to be sold by him, is the consignor.<sup>4</sup> That was a case in which it was made to appear that the goods were consigned to the consignee for him to sell; and the court, in determining the case, say that they were shown to have belonged to the plaintiffs, and to have been delivered by them to the carrier. So this case is well enough, standing on its own merits, and does not militate against the general rule, that in the absence of evidence to the contrary, the right of action is in the consignee.

**6. Limited liability.**—Limited liability of the company, if agreed to or accepted by the consignor at the time of making a consignment, is binding on all parties in interest, if shown by the bill of lading or receipt given for the goods, and the terms thereof be not in contravention of the law.<sup>5</sup>

<sup>1</sup> *Southern Express Co. v. Caperton*, 44 Ala. 101; *Hooper v. Chicago & N. Western Ry. Co.*, 27 Wis. 81.

<sup>2</sup> *Jones v. Sims & Scott*, 6 Porter, 138; *Southern Express Co. v. Caperton*, 44 Ala. 101; *Barrett v. Rogers*, 7 Mass. 297; *Hooper v. Chicago & N. Western Ry. Co.*, 27 Wis. 81.

<sup>3</sup> *Southern Express Co. v. Caperton*, 44 Ala. 101.

<sup>4</sup> *Sanford and another v. Housatonic Railroad Co.*, 11 Cush. 155. In *Cobb v. Ill. Cent. R. R. Co.*, 88 Ill. 394, 21 Am. Ry. Rep. 317, it is held that where, upon goods being shipped

to a purchaser thereof, the consignor forwards the bill of lading and draws upon the purchaser for the price, receiving payment therefor, the title vests in the purchaser; but the acceptance and payment of drafts drawn on general account will not have that effect. The objection may be taken under the general issue: *Ibid.*

<sup>5</sup> *Chicago & Aurora R. R. Co. v. Thompson*, 19 Ill. 578; *Am. Express Co. v. Perkins*, 42 Ill. 458; *Anchor Line v. Knowles*, 66 Ill. 150; *Oppenheimer & Co. v. U. S. Express Co.*, 69 Ill. 62.

If the consignor accept a bill of lading in which exceptions are made exempting the carrier from loss by fire, with fair knowledge on his part of such stipulation, and without objection, he will be bound thereby, unless as to fires and loss occurring by the negligence of the carrier.<sup>1</sup>

If the railroad company has excepted damage from any particular cause, it must clearly appear that the exception is the sole and proximate cause of the damage, without negligence on the part of the carrier.<sup>2</sup>

The terms of a receipt or bill of lading given by a transportation company for goods to transport, when such terms are not objectionable in point of law, are binding on the consignor or shipper who accepts the same with knowledge of the conditions expressed therein;<sup>3</sup> and such knowledge will be presumed, if nothing either way appear, from the fact of great familiarity of the shipper with the terms of the company, arising from frequent previous shipments through the company, and from possession by the shipper of a blank receipt book, used to being filled in at various times by such shipper for the signature of the company, upon delivering goods for shipment.<sup>4</sup> Hence, the delivery of goods for carriage of greater value than the amount for which liability of the company is in such receipt limited, without making known such value, and the taking therefor a receipt limiting liability to a lesser amount than the real value of the goods so delivered, will bar the right of recovery for any sum over that limited in the bill of lading, in case of loss.<sup>5</sup>

Moreover, justice and fair dealing requires of persons delivering goods for transportation a true statement of the nature and probable value of the property so consigned; and therefore, upon general principles, and aside from such stipulations and limitations in the bill of lading or receipt, the suppression of the true value, whereby transportation is obtained for a less

<sup>1</sup> *Anchor Line v. Knowles*, 66 Ill. 150.

<sup>2</sup> *Read v. St. Louis, Kansas City & Northern R. R. Co.*, 60 Mo. 199, 9 Am. Ry. Rep. 201.

<sup>3</sup> *Oppenheimer & Co. v. U. S. Express Co.*, 69 Ill. 62.

<sup>4</sup> *Oppenheimer & Co. v. U. S. Express Co.*, 69 Ill. 62.

<sup>5</sup> *Oppenheimer & Co. v. U. S. Express Co.*, 69 Ill. 62. But it is otherwise as to loss occasioned by negligence of the carrier; for such he is liable in the real value; and it does not affect such liability that carriage for a less sum was obtained thereby: *United States Exp. Co. v. Backman*, 28 Ohio St. 144, 14 Am. Ry. Rep. 82.

charge than if the value be made fully known, is fraudulent, and will deprive the consignor of the right of recovery for the goods, if lost, for a larger value than the price paid for freight thereof indicates.<sup>1</sup>

7. **Release of damages by consignor.**—A release of damages to property carried, executed by the shipper, for value, releases the company, although he in fact be but the agent of some one else in shipping the goods, provided his true character as agent be unknown to the company at the time of liquidating the matter;<sup>2</sup> and though there be not any technical release as to form, yet a written contract embodying suitable terms of release is all that is required in that respect.<sup>3</sup> Moreover, as to the power of the shipper to release, if the true owner claim the benefit of the shipment, as having been made for him, and in his behalf, by the ostensible shipper, then he thereby recognizes the right of the shipper to act as his agent, and is bound by his action.<sup>4</sup>

<sup>1</sup> *Chi. & Aurora R. R. Co. v. Thompson*, 19 Ill. 578; *Am. Ex. Co. v. Perkins*, 42 Ill. 458; *Oppenheimer & Co. v. U. S. Express Co.*, 69 Ill. 62.

<sup>2</sup> *McCann v. Balt. & Ohio R. R. Co.*,

20 Md. 202.

<sup>3</sup> *McCann v. Balt. & Ohio R. R. Co.*, *supra*.

<sup>4</sup> *McCann v. Balt. & Ohio R. R. Co.*, *supra*.

## CHAPTER LIX.

### STOPPAGE IN TRANSITU.

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How it may be enforced . . . . .	4	The law of inter-state consignments . . . . .	8

**1. The right of.**—The right of stoppage *in transitu* is a right in law of certain persons, under particular circumstances hereinafter described, to stop the goods and obtain possession thereof in the course of their transit, in the hands of a carrier, warehouseman or other person, after consignment, and before they come to the possession, actual or constructive, of the consignee, and upon payment of the freight and charges incident to their carriage and due thereon.<sup>1</sup> This right was first asserted in a court of equity in England, by a consignor who was vendor of the goods, against the consignee, his vendee. The right claimed was in the nature of an equitable lien for the unpaid purchase money of the goods, and upon the ground that the purchaser and consignee had become insolvent after the purchase and consignment of the goods. The court of equity ordered a trial at law, as in trover and conversion, to be had between the parties, to determine if the consignment vested the right of property in the consignee. It being determined that in law it did, the chancellor then allowed the stoppage *in transitu* by the consignor, as a matter of equity, based upon the equitable lien of the vendor for the price of the goods.<sup>2</sup> Thereafter the claim has uniformly been sustained and enforced in the courts of law.<sup>3</sup> It rested

<sup>1</sup> 2 Kent, 2 ed., 540, 541, 542, 543; Cox v. Burns & Rentgen, 1 Iowa, 64, 68; Newhall v. Vargas, 13 Maine, 93; Mohr v. The Boston & Albany R. R. Co., 106 Mass. 67; Reynolds v. The Boston & Maine R. R. Co., 43 N. H	580. <sup>2</sup> Wiseman v. Vandeputt, 2 Vern. 203. <sup>3</sup> Sweet v. Pym, 1 East, 4; Ludlow v. Bowne, 1 John. 16; Wood v. Roach, 2 Dall. 180.
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originally upon a claim of the vendor, or person standing in the relation of vendor, of goods, in the nature of an equitable lien for the purchase money, where the goods had been sold upon a credit, and consigned by the vendor to the vendee.<sup>1</sup> Though it has been somewhat enlarged in its application by subsequent rulings, as will be seen hereafter, it does not extend to cases of naked liens of an independent character, not originating in a prior ownership of the goods, as, for instance, liens for work and labor thereon, or for betterments thereto. The latter are lost by parting with possession, as by consignment of the goods.<sup>2</sup>

2. **Who may avail themselves of the right.**—Though this right was originally regarded as affording a remedy only to a consignor who at the same time was a vendor of the goods to the consignee upon a credit,<sup>3</sup> yet in process of time it came to be extended in its application to others having equitable liens upon the property, and being consignors thereof. Thus, as the law now is, not only a regular vendor of the goods, but one who becomes a purchaser thereof for the benefit of the consignee, and trusts him in turn for the same, being consignor of the goods, is so far treated as a vendor that he may resort to this remedy of reclaiming the same, in like manner as may an ordinary vendor who is also the consignor.<sup>4</sup> And in cases where the consignor is the vendor, or creditor in the nature of a vendor, of the goods, this right exists in his favor, whether the time of the credit given has or has not expired at the time the right to resume the possession of the goods *in transitu* is exercised by the consignor as vendor. If all other grounds for enforcing this right exist, then it is not necessary that the time of payment shall have expired and the money have become due, so as to be the subject of an action.<sup>5</sup>

So, likewise, a person who consigns goods to his factor, either on a credit, as vesting the same in him and trusting him for payment for the same, or with intent that the goods so sent are

<sup>1</sup> Sweet v. Pym, 1 East, 4; Siffken v. Wray, 6 East, 371; 2 Kent, 2d ed., 540, 541; Cox v. Burns & Rentgen, 1 Iowa, 64, 68; Newhall v. Vargas, 13 Maine, 93, 103; Mottram v. Heyer, 5 Denio, 629.

<sup>2</sup> Siffken v. Wray, 6 East, 371;

Sweet v. Pym, 1 East, 4; 2 Kent, 2d ed., 542.

<sup>3</sup> 2 Kent, 2d ed., 540.

<sup>4</sup> Newhall v. Vargas, 13 Maine, 93.

<sup>5</sup> Mottram v. Heyer, 5 Denio, 629, 630.

to be sold by the factor, and the proceeds of sale to be accounted for and paid over to the consignor, is so far considered in the light of a creditor of the consignee, that the consignor may exercise and enforce the right of stoppage *in transitu*, and resume the possession of the goods, in case of the bankruptcy or insolvency of the consignee, occurring after the making of the consignment, and before the delivery of the goods to him.<sup>1</sup>

3. Under what circumstances it may be exercised.—The right of stoppage *in transitu* may be resorted to by a vendor who is also consignor, and has not been paid the purchase money, whenever the vendee, he being the consignee, becomes bankrupt or insolvent after the sale and consignment of the goods, and before their coming into the actual or constructive possession of the consignee by a regular and proper delivery thereof;<sup>2</sup> or being so before that fact becomes known to the consignor, after making the consignment.<sup>3</sup>

But a wrongful delivery to the consignee by the carrier, after proper notice not to deliver the same, and of the consignor's election to exercise the right of reclaiming the goods, will not defeat the claim of the consignor, as against the consignee or his assignee.<sup>4</sup>

So, likewise, if the consignor has purchased the goods upon his own credit, or with his own means, for the benefit of the consignee, thereby rendering the consignee his debtor for the costs thereof, if the consignee becomes bankrupt or insolvent after such purchase and consignment, and before delivery of the goods to the consignee in the ordinary course of carriage and delivery, then the consignor is entitled, in like manner as if an ordinary vendor upon a credit, to exercise the right of stoppage *in transitu*,<sup>5</sup> and this, too, although such consignor charge and receive a commission for his credit and services in reference thereto.<sup>6</sup>

4. How it may be enforced.—The first step to be taken by the consignor for the enforcement of this right, is the service of

<sup>1</sup> 2 Kent, 2d ed., 542, 543; Stubbs v. Lund, 7 Mass. 457.

<sup>2</sup> Newhall v. Vargas, 13 Maine, 93; 2 Kent, 2d ed., 540; Mottram v. Heyer, 5 Denio, 629; Rogers v. Thomas, 20 Conn. 53; Pattison v. Culton and others, 33 Ind. 240; S. C. 5 Am. R.

199.

<sup>3</sup> Reynolds v. The Boston & Maine R. R. Co., 43 N. H. 580.

<sup>4</sup> Newhall v. Vargas, 13 Maine, 93.

<sup>5</sup> Newhall v. Vargas, 13 Maine, 93.

<sup>6</sup> Newhall v. Vargas, 13 Maine, 93.

a notice upon the carrier, describing and identifying the goods, the nature of his claim, the evidences thereof, and of his own identity as consignor, and notifying the carrier not to deliver the same to the consignee.<sup>1</sup> By respectable American cases it is held that no demand of possession is necessary, but merely the notice.<sup>2</sup> The legal effect of this notice, if it be properly given, and there be just grounds for enforcement of the right, seems to be to reinstate in the consignor the right of possession of the goods, as against the consignee, or his vendee, if sold by him before obtaining possession of the goods and the arrival of the bill of lading.<sup>3</sup>

After the service of such notice on the carrier, he can not deliver the goods to the consignee without rendering himself liable to the consignor, in case it turns out that such consignor is entitled to the possession of the goods, and incurs a loss by reason of their being delivered to the consignee.<sup>4</sup>

Moreover, if after such notice the goods be delivered by the carrier to the consignee, the consignor may enforce his right thereto, if well founded, by an action of trover or replevin therefor against the consignee, or other person in possession thereof.<sup>5</sup>

The notice must be given to those in whose custody the goods actually are at the time, or else to the principal carrier himself, or some one of the principal officers of the company, if the carrier be a railroad company; as, for instance, the superintendent in charge, or else president of the company, or such principal personage as has official authority to order the stoppage of the goods; and if to a subordinate servant, it must be one who has the goods at the time under his immediate control. If not so given, it will neither re-invest the ownership and property in the consignor, nor charge the company so as to prevent delivery to the consignee.<sup>6</sup> Moreover, if the notice be given to the prin-

<sup>1</sup> Abbott on Shipping, 528, original paging; *Pattison v. Culton* and others, 33 Ind. 240; S. C. 5 Am. R. 199; 2 Kent, 2d ed., 543.

<sup>2</sup> *Reynolds v. The Boston & Maine R. R. Co.*, 43 N. H. 580.

<sup>3</sup> *Pattison and others v. Culton* and others, 33 Ind. 240; S. C. 5 Am. R. 199; *Newhall v. Vargas*, 13 Maine,

93; 2 Kent, 2d ed., 543.

<sup>4</sup> Abbott on Shipping, 528.

<sup>5</sup> Abbott on Shipping, 528; *Redfield on R. W.* 804, original ed.; *Hunter v. Beal*, and *Stokes v. LaReviere*, cited 3 Term Rep. 466; *Jackson v. Nichol*, 5 Bing. N. C., 518.

<sup>6</sup> *Houston on Stoppage in Transitu*, 54, 55.



cipal carrier or officer, it must be so given as to time and place, and in reference to the locality of or place where the goods are situated, as to enable such superior, by reasonable diligence, to order the servants in charge to hold the goods, and thereby prevent their delivery. A notice at a different place from where the goods are is insufficient, unless the means of communication are such as to enable the principal to conveniently communicate with the person in charge, and order him to stop the goods.<sup>1</sup>

After notice, it becomes the duty of the carrier to hold the goods, and not deliver them to the consignee. The law will then afford the parties, consignor and consignee, or the assigns of the latter, such opportunity of asserting and enforcing their rights to the property as will effectually guard the interests of the carrier from the responsibility of delivering to either when not entitled to receive the same. We do not conceive it to be the duty of the carrier to decide between them, and actually deliver the goods to the alleged consignor, or that it is required by law, forasmuch as the carrier can seldom, if ever, know, and is not made the judge to decide, whether or not the circumstances exist which re-invest the property in the consignor, or, indeed, whether the person claiming to be the consignor be, in fact, such or not; and especially on long lines of railway, is personal knowledge the more impracticable. After notice, he occupies the position of a stake-holder between the parties.<sup>2</sup>

Nor is the carrier required in law to break up trains, and stop and deposit the goods or deliver them at intermediate places; or even at intermediate stations, *en route* their transit, nor to re-transport them back to the place of consignment; but may proceed with them to the place to which they are consigned, and are embarked in the train, and there deposit and hold the goods subject to the enforcement of the rights of the contending parties, on payment of the charges of transportation and warehousing. No additional obligation than those arising from the terms of shipment can be forced upon the carrier by such notice, except the duty of stopping or holding the goods from delivery to the consignee. He has a right to

<sup>1</sup>Houston on Stoppage in Transitu, 56, 57; Litt v. Cowley, 7 Taunt. R. 169.

<sup>2</sup>Houston on Stoppage in Transitu, 51; Abbott on Shipping, 394, 395;

Mills v. Ball, 2 B. & P. 457. The notice has the effect to place the goods *quasi in custodia legis*: Abbott on Shipping, 439.

carry them to the place of destination, as he contracted to do, and to have his freight and charges paid before the goods are taken from his possession. In short, the duty of the carrier, raised by the notice, is a negative one. It requires him to not deliver the goods to the consignee, thereby placing him in the light of a stake-holder of the property for those who may, by legal process, prove themselves entitled to it. It does not make the carrier a judge to decide who is entitled to the property, nor is he bound to take on himself the responsibility of determining that question; but it becomes his duty to hold it, and let the parties assert their rights by judicial process, as in cases of other dispute about property in the hands of a third person, and if need be, the parties may be compelled, on general principles, at his application, to interplead with each other as to the ownership or right of possession.<sup>1</sup>

Some writers go further, and hold, upon the authority of the English cases, that after notice from the consignor of his claiming the right of stoppage *in transitu*, and a demand of the goods, it devolves upon the carrier to ascertain the correctness or incorrectness of such claim; for that if the claim turns out to be well founded, the carrier will be liable to the consignor for the value of the goods in an action of trover, in case he decline to deliver the goods to the consignor after such notice and demand.<sup>2</sup> But Kent, recognizing the severity of such a rule, asserts it to be proper for the carrier to compel the adverse party claimants, or those placed by law in possible interest, to interplead, by filing a bill in chancery against them, and thereby ascertain to whom the goods are rightfully deliverable.<sup>3</sup> In such procedure the court would, upon general principles, we suppose, place the property in the care or disposition of a receiver, to abide the event of the cause. The language of Justice KENT is: "It is often difficult for the master of a vessel to know to whom he can safely deliver the goods, in case of conflicting claims between consignor and consignee, or consignor and the assignee of the consignee. Prudence would dictate that he deliver the goods to the party upon whose indemnity he can most safely rely. But he ought

<sup>1</sup> Abbott on Shipping, 395, 396.

<sup>2</sup> Redfield on Railways, Vol. 1, original ed., 304. In this connection the learned author cites, *Litt v. Cowley*, 7

Taunt. 169; *Bohtlingk v. Inglis*, 3 East, 381; *Syeds v. Hay*, 4 Term Rep. 260.

<sup>3</sup> 3 Kent, 2 ed., 215, 216.

not to be put to the peril and necessity of indemnity; and it is desirable that he should know to whom of right he can deliver the goods. \* \* \* \* It is safest for the master to deposit the goods with some bailee, until the rights of the claimants are settled, as they can always be, upon a bill of interpleader in chancery, to be filed by the master.”<sup>1</sup>

Upon regaining possession of the goods by the consignor, he may treat them absolutely as his own, and may dispose of the same, if the shipment be procured by fraud;<sup>2</sup> or if contracted for on a credit, under false pretenses of the consignee, he may treat the contract as void, and the goods as his own.<sup>3</sup> And so if consigned to the consignee without sale, as the mere agent or bailee of the consignor, without any claim or vested right of the consignee to the same, then the consignor, on regaining possession, may in like manner treat the goods as his absolute property; which, in such cases, they really are.<sup>4</sup>

**5. How long the right continues.**—The right of stoppage *in transitu* continues until the goods have reached their destination, and have come into the possession, actual or constructive, of the consignee. This right remains, not only while the goods are in the act of being carried, and are moving on in the hands of the carrier, but also while they are in the hands of a warehouseman, or in a place of deposit connected with their transmission or delivery, after arrival at their point of destination;<sup>5</sup> and so as to any place not actually or constructively the place of the consignee, or not so in his possession or control that the putting them there implies an intention to thereby deliver the same to such consignee.<sup>6</sup> A delivery to a wharfinger or warehouseman at the place of destination, who receives them not as agent of, or for the consignee, but in the ordinary course of his business as a middle-man, is not a constructive delivery to the consignee, so as to put an end to the right of stoppage *in transitu*.<sup>7</sup>

<sup>1</sup> 3 Kent, 2 ed., 215, 216. And this rule is recognized as just, in *Jordan, Ellis & Co. v. James & James*, 5 Hammond (5 Ohio), 88, 107. See also, *Abbott on Shipping*, 381, and *The Constantia*, 6 Rob. Adm. R. 321, referred to in this case cited from 5 Ham.

<sup>2</sup> *Fitzsimmons v. Joslin*, 21 Vt. 129.

<sup>3</sup> *Fitzsimmons v. Joslin*, 21 Vt. 129.

<sup>4</sup> *Fitzsimmons v. Joslin*, 21 Vt. 129.

<sup>5</sup> *O'Neil v. Garrett, sheriff*, 6 Iowa, 480, 484; *Covell v. Hitchcock*, 23 Wend. 611; *Newhall v. Vargas*, 13 Maine, 93.

<sup>6</sup> *O'Neil v. Garrett, sheriff*, 6 Iowa, 480, 484.

<sup>7</sup> *O'Neil v. Garrett, sheriff*, 6 Iowa, 480, 484; *Calahan and others v. Babcock and others*, 21 Ohio St. 281.

This right of stoppage *in transitu*, in cases of carriage by rail, is not defeated by a delivery of the goods by the carrier to a drayman, or other local carrier, at the depot, to be carried or delivered to the consignee at his place of business or residence; but is continuous until the goods pass into the possession of the consignee,<sup>1</sup> and is paramount to any lien or right emanating from the consignee.<sup>2</sup>

There are cases of high authority, and which we in no manner question the correctness of, in reference to a constructive delivery when transportation has been by boat, wherein it is held that a discharge of the goods onto a wharf, with intent to place them or leave them subject to the control of the consignee, there being no other custodian thereof, and the freight having been all paid, and it having been customary to thus deliver to the same consignee, is such a constructive delivery to the consignee, that thereby the right of stoppage *in transitu* is lost, so that when the same goods are levied on in favor of a creditor of the consignee, an intervening *bona fide* purchaser thereof is entitled to hold the same.<sup>3</sup> In the case referred to from 20 Vermont, the court say: "It is difficult to conceive of a more effectual delivery of goods than this, short of their coming to the corporal touch of the vendee. The special property of the carriers had ceased; the wharfinger had nothing to do with the goods, and unless they are to be considered as having been in the possession of the vendee, no person whatever had any possession of them,—they were absolutely abandoned by all persons." And in the same connection the court add: "They must therefore have come to the possession of" the consignee. "It being the custom for" him "to receive goods, thus consigned him, on the wharf," and that, therefore, "that must be considered as the place to which they were directed by the vendor."<sup>4</sup> But this case may not be taken as authority when applied to cases arising out of transportation by railroad. In the latter cases, goods are not to be delivered on the platform by merely leaving them there, but if not called for are, as we have before seen, to be stored for safe keeping in a warehouse; whereas, in transportation by boat, it is all

<sup>1</sup> 2 Kent, 2 ed. 544; Calahan and others v. Babcock and others, 21 Ohio St. 281.

<sup>2</sup> O'Neil v. Garrett, sheriff, 6 Iowa,

480; 2 Kent, 541.

<sup>3</sup> Sawyer v. Joslin, 20 Vt. 172.

<sup>4</sup> 20 Vt. 180.

the boat can do to leave the goods, if at a way landing, upon the wharf. Moreover, in the case cited above, a special custom was shown to that effect, in reference to the consignee in that particular case.<sup>1</sup>

6. **Not defeated by a levy in favor of a general creditor.**—A levy of the goods on writ of attachment or execution against the consignee, before the goods have come into his possession, will not divest the consignor's right of stoppage *in transitu*.<sup>2</sup> And as the right is so far exercised by the ordinary notice and claim thereof to the carrier, that thereafter a delivery by the carrier to the consignee will not defeat the same in his favor, or even in favor of his assignee,<sup>3</sup> so it would seem to follow that neither would a levy of the goods after such inhibited or forbidden delivery, even if the levy be made after delivery to the consignee, defeat the right of the consignor of stoppage *in transitu*. The assertion of such right, by notice to the carrier of the intention to exercise it, and not to deliver to the consignee, would seem to place it out of the power of the carrier to thereafter make such a delivery to the consignee as will defeat the right of the consignor, if the doctrine laid down by Chitty and by Justice Parsons is to be regarded as law;<sup>4</sup> and such, too, seems to be the current of authorities.<sup>5</sup>

In *Sawyer v. Joslin*, 20 Vermont, 172, cited in this connection, *supra*, the court say: "although the goods, by being dispatched to the vendee by the usual modes of conveyance, become, for other purposes, the property of the vendee, are considered in his constructive possession and at his risk," that "yet the vendor is held to have such an equitable lien on them, though out of his possession, that, on learning the insolvency of the vendee, he may reclaim them, while in their transit to him, as

<sup>1</sup> *Sawyer v. Joslin*, 20 Vt. 172, 180. The court say that the case here cited is not like one where the goods, though arrived at the place of delivery, are still on shipboard, in the hands of the carrier or wharfinger, or his agents, subject to the carrier's lien for freights: *Ib.*

<sup>2</sup> *Cox v. Burns*, 1 Iowa, 64; *O'Neil v. Garrett*, sheriff, 6 Iowa, 480, 486; *Buckley v. Furniss*, 15 Wend. 137;

*Covell v. Hitchcock*, 23 Wend. 611; *Naylor v. Dennie*, 8 Pick. 198; *House v. Judson*, 4 Dana, 11; *Sawyer v. Joslin*, 20 Vt. 172; *Calahan and others v. Babcock and others*, 21 Ohio St. 281.

<sup>3</sup> Chitty on Contracts, 8 ed. 381.

<sup>4</sup> Chitty on Confs., 8 ed., 381; 1 Parsons on Confs., chapt. 6, p. 447.

<sup>5</sup> *Newhall v. Vargas*, 13 Maine, 93, 109; *Mottram v. Heyer*, 5 Denio, 629; *Naylor v. Dennie*, 8 Pick. 198.

security for the price for which they had been sold." And that "This right of stoppage *in transitu* is held not to be defeated by an attachment of or levy upon the goods, as the property of the vendee, while in their transit."

7. **How the right may be defeated.**—There are various other ways in which the consignor's right to stop and resume possession of the goods in the course of their transit may be terminated, than by their coming into the possession of the consignee. This right is terminated by the payment of the purchase money, or so much thereof as still remains unpaid, if claimed as security therefor;<sup>1</sup> but if only a part thereof be paid, then the right of stoppage *in transitu* is terminated only for a similar proportion of the goods.<sup>2</sup> And if the goods be really stopped, and the possession resumed by the consignor, yet the consignee may release the same, and obtain possession thereof, on the payment of the purchase money, in case the goods were consigned upon a transaction between the parties as vendor and vendee, or in the legal character thereof.<sup>3</sup>

And, on the other hand, the vendor may recover the price of the goods in an action at law, although he has resumed the possession thereof by the right of stoppage *in transitu*, and after such recovery may execute and sell the same; for this procedure to resume possession while the goods are in course of transit is not predicated upon a supposed rescission of the contract of sale, but upon the principle of enforcing the vendor's lien for the purchase money.<sup>4</sup> It results, therefore, that the vendor may hold the goods, when thus again in his possession, until the termination of the action, and if judgment be obtained, he may cause a levy and sale thereof, to realize his purchase money; or, in case of bankruptcy, may, instead of suing, elect to rescind the sale, on account of the bankruptcy or insolvency of the vendee, and treating the goods as his own, may sell or dispose of them at pleasure, or may elect to sell the same to satisfy his debt, thereby affirming the contract. In the latter case, any excess of the price and costs of carriage, storage and sale, realized by

<sup>1</sup> Newhall v. Vargas, 13 Maine, 93; 2 Kent, 2d ed., 541. But not by a bill drawn, or note given, for the price; such instruments are not payment: Newhall v. Vargas, *supra*.

<sup>2</sup> Newhall v. Vargas, 13 Maine, 93.

<sup>3</sup> 2 Kent, 2d ed., 541. But there must be actual payment; the giving a bill of exchange or note is not sufficient: *Ib.*

<sup>4</sup> 2 Kent, 2d ed., 541.

the sale, will belong to the consignee; and if, on the other hand, the proceeds be insufficient to meet such price and costs of carriage, storage and sale, the amount of the remaining balance may be recovered by the consignor of the consignee in an action at law.

But the transfer, by indorsement or assignment, of the ordinary bill of lading, by the consignee to a *bona fide* holder or purchaser thereof, for a valuable consideration, without notice to such purchaser of the insolvency or bankruptcy of the consignee, will terminate the consignor's right of stoppage *in transitu*.<sup>1</sup>

8. **The law of inter-state consignments.**—The right of stoppage *in transitu* follows the goods during transit, and up to the time of their delivery to the consignee, wherever they go. Thus, if a vendor consign goods in one country to his vendee, as consignee, in another country or state, then whatever right of stoppage *in transitu* the consignor has by the law of the place of consignment, attaches itself to the goods as *in rem*, and adhering to them whithersoever they go, may be enforced in such other state or country as they may pass into in the course of their transit.<sup>2</sup> And this right will prevail everywhere over the rights of intervening purchasers, and over levies of process against the consignee made during the transit of the goods, to the same extent as in domestic consignments.<sup>3</sup>

<sup>1</sup> Conard v. Atlantic Ins. Co., 1 Pet. 386; Stubbs v. Lund, 7 Mass. 457; Winslow v. Norton, 29 Maine, 419; Pattison v. Culton, 33 Ind. 240; S. C. 5 Am. R. 199; Newhall v. Central Pacific R. R. Co., 51 Cal. 345, 12 Am.

Ry. Rep. 229.

<sup>2</sup> Story's Conflict of Laws, secs. 401, 402, 402 a; Inglis v. Usherwood, 1 East, 515.

<sup>3</sup> Story's Conf. of Laws, sec. 402.

## CHAPTER LX.

### FREIGHTS, FARES AND TOLLS.

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**1. What they are.**—Freights, fares, and tolls, are terms which have each their distinctive meaning, not only in common acceptation, but also in legal parlance.<sup>1</sup> The term freight, in its more general sense, is used as well in reference to property carried, as to the price or compensation to be paid for its carriage. In the latter and more limited sense of our text, it is our purpose to speak of it here. It is that which is paid, or to be paid, for the service of transporting merchandise and other property.<sup>2</sup> It is contradistinguished from toll in this, that it is not a price paid for the use of the road, on which to transport one's own property, but is paid for the service of the company, and carriage of the property by it;<sup>3</sup> whereas, on the other hand, in the language of the learned Justice STRONG, "The legal meaning of the word 'toll' is, and always has been, well defined. It is 'a tribute or custom paid for passage,' not for carriage—always something taken for a liberty or privilege, not for a service; and

<sup>1</sup> Boyle v. Phila. & Reading R. R. Co., 54 Penn. St. 310; Penn. R. R. Co. v. Sly, 65 Penn. St. 205; The State of New Jersey v. Haight, 1 Vroom (N. J.), 447.

<sup>2</sup> Penn. R. R. Co. v. Sly, 65 Penn. St. 205.

<sup>3</sup> Boyle v. The Phila. & Reading Railroad Co., 4 P. F. Smith (54 Penn. St.), 310; Penn. R. R. Co. v. Sly,

65 Penn. St. 205; The State of New Jersey, The Jersey City & Bergen R. R. Co., prosecutors, v. Haight, 1 Vroom (N. J.), 447. In the case last cited, the New Jersey Supreme Court of Errors and Appeals say: "Tolls are collected from persons who pass or travel by their own conveyances over the roads or bridges of another." 1 Vroom, 448.



such is the common understanding of the word. Nobody supposes that tolls taken by a turnpike or canal company include charges for transportation, or that they are anything more than an excise demanded and paid for the privilege of using the way.”<sup>1</sup>

Hence, in *Pennsylvania Railroad Co. v. Sly*, the Supreme Court of Pennsylvania, SHARSWOOD, J., in treating of the language of the statute giving to the Sunbury & Erie Railroad Company the power to collect freight and tolls, say: “We can not attribute to the legislature the absurdity of providing that the company should collect, besides freight, tolls on merchandise carried by themselves. That would be to authorize them to charge themselves for the use of their own road. The meaning evidently was, that as they might allow private transporters to place their cars on the road, they should still have the right to tolls under the original limitation, both as to merchandise and passengers”<sup>2</sup> thus carried over the road by private transporters in such private transporters’ own cars.

And so freight, in its ordinary sense, does not include fare. By the term fare is meant that which is payable for a ticket and passage of a person, and the ordinary service of transportation or carriage of the person himself.<sup>3</sup>

**2. Right to, and to fix the rate.**—A railroad company is entitled, as a legal right, to compensation, by way of rates and charges, for services rendered in transporting persons and property, whether such right is expressly granted by the charter or not. The right to exact and collect compensation for services is a necessary attribute of such corporations, and results from the purposes of their organization and nature of their business.<sup>4</sup> On this subject the Supreme Court of Pennsylvania, STRONG, J., by adopting the opinion of AGNEW, Justice, at *nisi prius*, in *Boyle v. Phila. & Reading R. R. Co.*, lay down the law in the following terms: “No provision was made respecting rates and charges for their

<sup>1</sup> *Boyle v. The Phila. & Reading R. R. Co.*, 4 P. F. Smith (54 Penn. St.), 310, 313, 314. And see, also, the same principles asserted in *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205; *State, Jersey City & Bergen R. R. Co.*, prosecutors, *v. Haight*, 1 Vroom, 447.

<sup>2</sup> *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205, 211.

<sup>3</sup> *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205, 211.

<sup>4</sup> *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205; *Boyle v. The Phila. & Reading R. R. Co.*, 54 Penn. St. 310.

own service as carriers; but the very purpose of their incorporation was that they might carry. How can they carry without compensation? Authorized to engage in a business, it is necessarily incident to their authority that they have the rights which ordinarily belong to such a business. \* \* \* The right to charge is implied in the nature of the business authorized, and I can not conceive of conducting the business of transportation without the imposition of rates and charges."<sup>1</sup> Such is the language of Justice STRONG in relation to the charter right of the Sunbury & Erie Railroad Company, now Philadelphia & Reading Railroad Company, to compensation for services rendered. In the same case, the Supreme Court of Pennsylvania, STRONG, J. (now of the United States Supreme Court,) say: "We adopt the opinion delivered at Nisi Prius when the bill of complaint was dismissed. Nothing in the argument before us has brought us to doubt the soundness of the conclusion then reached. It would be easy to show more fully, were it necessary, that a grant of power to enter into the business of transportation of passengers and merchandise carries with it authority to enter into the contracts by which the business of common carriage is conducted, but it is too obvious to require argument to prove it."<sup>2</sup>

If it be not otherwise provided in the charter, and there be no contemporaneous law, at the time of its organization, vesting the right in the state or public authorities to fix the rate of compensation, and the same be not subsequently parted with by some act of the company, then, in the absence of any subsequent enactment regulating the same, it results from the very nature of things, and from the general power to transact business, render service, and receive pay therefor, and the power to make contracts, that the terms of service, and amount or rate of compensation to be paid for the same, are rightful subjects of regulation by the corporate body itself, through its regularly constituted officers, servants and agents.<sup>3</sup>

What is lawful is reasonable; and so what is unlawful is un

<sup>1</sup> Boyle v. Phila. & Reading R. R. Co., 4 P. F. Smith (54 Penn. St.), 310, 316; and see the doctrine re-asserted in Penn. R. R. Co. v. Sly, 65 Penn. St. 205, 211.

<sup>2</sup> Boyle v. Phila. & Reading R. R.

Co., 54 Penn. St. 310, 318. \*

<sup>3</sup> Crocker v. New London, Williamantic & Palmer R. R. Co., 24 Conn. 249; The State v. Chovin, 7 Iowa, 204; State v. Overton, 4 Zab. (N. J.), 435.

reasonable. Therefore, authority in a railroad corporation to fix reasonable rates, means within the limit, if any there be, fixed by law.<sup>1</sup> If fixed in excess of such limit, they are unreasonable and invalid; and whether they are thus excessive, is a question of law for the court.<sup>2</sup> If fixed within the limit, under authority requiring them to be reasonable and within such limit, then their reasonableness is a question of fact for the jury, under the charge of the court as to the law.<sup>3</sup> A law fixing a maximum of rates for a fixed number of miles, or more, and leaving the company to fix reasonable rates for less distances, will not allow a greater maximum of compensation to be charged for any lesser distance than the one so fixed by the statute for the greater distance.<sup>4</sup>

And so in New Jersey, a like principle is asserted. It is there held that the regulation of the tolls of bridges and turnpike roads, and the fares of railroads and ferries, is not a regulation of commerce, but is a part of that general police power essential to every state, and which has not been surrendered to the general government.<sup>5</sup> The case here cited from 4 Zab. involved the question of ferry rates at the Jersey City ferry, across the Hudson river. The court held that this power existed in the state, although the ferry is between two states, and that each state may fix the rate of ferriage from its own side; and "the fares of railroads" are expressly included as within the doctrine claimed.<sup>6</sup> But when it is borne in mind that a ferry, as there shown, is operated under a revocable license, while, as is well known, railroads are ordinarily constructed by chartered incorporations, and that a charter is a contract which may not be impaired, it, therefore, may not follow that in all cases the state may so regulate rates, as

<sup>1</sup> *Campbell and others v. The Marietta & Cincinnati R. R. Co.*, 23 Ohio St. 168; *Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co.*, 23 Ohio St. 10, 15.

<sup>2</sup> *Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co.*, 23 Ohio St. 10, 15. See *Sloan v. Pac. R. R. Co.*, 61 Mo. 24; *Ladd v. Southern C. P. & M. Co.*, 53 Tex. 172; S. C. 10 Repr. 186.

<sup>3</sup> *Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co.*, 23 Ohio St. 10; *Campbell and another v. The Marietta & Cincinnati R. R. Co.*, 23 Ohio St.

168, 190.

<sup>4</sup> *Campbell and others v. The Marietta & Cincinnati R. R. Co.*, 23 Ohio St. 168, 190; *Smith v. Pittsburg, Fort Wayne & Chicago Ry. Co.*, 23 Ohio St. 10, 15.

<sup>5</sup> *Freeholders of Hudson County v. The State, the New Jersey R. R. & Trans. Company, prosecutors*, 4 Zab. 718, 728.

<sup>6</sup> *Freeholders of Hudson County v. The State, The New Jersey R. R. & Trans. Company, prosecutors, supra.*

against a railroad corporation; that may depend upon the terms of the charter contract. The claim, however, which is more immediately asserted in the Jersey City case, is a claim of power in the state in contradistinction of, and as against, the power of the general government.

Independent of any by-law or regulation of its own, a railroad company has a right to charge for the transportation of passengers, different rates for different trains, or a higher price for way passengers per mile, than for passengers all the way through, if there be nothing to the contrary in the charter, or in the law of the land.<sup>1</sup> This right, in the absence of any inhibition in the charter or law, the company may necessarily exercise, as is believed, by fixing the amount of such charges itself; and to do this requires neither by-law nor formal regulations,<sup>2</sup> for the right to charge implies the right to fix the amount thereof.<sup>3</sup>

So by the Supreme Court of Delaware it is held, that the right of a corporation to conduct its own business, and adjust its tariff of reasonable charges, stands upon special ground, not applicable to an unincorporated carrier, inasmuch as such right of a corporation is a part of the corporate franchise granted by charter, and is protected by the Constitution of the United States; and that any interference with this right by legislative enactment amounts to an alteration and infringement of the company's charter.<sup>4</sup> The regulation of tolls and charges of a railroad is here said not to be the exercise of police power.<sup>5</sup> Authorities to the same effect might be multiplied, were it advisable, but the rulings in the Supreme Court of the United States, in *Munn* and *Scott v. The People of Illinois*, and in *The Chicago, Burlington and Quincy Railroad Company v. Cutts*, Attorney-General of Iowa, and others,<sup>6</sup> having laid down a different rule,

<sup>1</sup> *State v. Overton*, 4 Zab. 435.

<sup>2</sup> *State v. Overton*, 4 Zab. 435.

<sup>3</sup> *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205.

<sup>4</sup> *Phila., Wilmington & Baltimore R. R. Co. v. Bowers*, 4 Houst. 506; S. C. 6 Am. R. W. Reps. 105.

<sup>5</sup> *Phila., Wilmington & Baltimore R. R. Co. v. Bowers*, 4 Houst. 506.

<sup>6</sup> *Munn v. State of Ills.*, 94 U. S.

113; *Chicago, B. & Q. R. R. Co. v. State of Iowa*, *Id.* 155. And it is no answer to say that the amount demanded is no more than a reasonable charge: *Chicago, M. & St. P. R. R. Co. v. Ackley*, 4 Otto, 179, 16 Am. Ry. Rep. 176. And see *Winona & St. Peter R. R. Co. v. Blake*, 4 Otto, 180, 16 Am. Ry. Rep. 177. In the latter case it was held there was nothing in the

and asserted the power of the several states to regulate the rates of railroad charges on business not inter-state in its nature, when no express grant of such power is vested in the company by its charter, it were useless to cite local authorities to the contrary. These decisions are deemed of sufficient importance to be given herewith at length, as the original of the reported case may not always be accessible to the practitioner.

*Munn and Scott v. The State of Illinois.*

Per CHIEF JUSTICE WAITE.—The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, fix by law the maximum of charges for the storage of grain in warehouses at Chicago and

charter of the company, nor in an act of the legislature of Minnesota, or sec. 4, art. 10, of the constitution of that state (obligating the company to carry freight and passengers upon "reasonable terms"), affecting this power. And see also *Peik v. Chi. & N. W. Ry. Co.*, 4 Otto, 164, 16 Am. Ry. Rep. 413. In this case there was a charter provision giving the right to receive a reasonable sum, but the state constitution reserved the right to alter or repeal the charter. And consolidation would not affect this right: *Ibid*; nor the fact that the company was bound to keep a certain portion of the road open as a public highway for the United States government, free from charge, and to transport the mails thereon: *Ibid*. It was further held that, until Congress acted in reference to the relations of this company to inter-state commerce, it was competent for the state to regulate its fares, etc., so far as they were of domestic concern; and that the statute of Wisconsin (Chap. 273, Laws 1874), under which the case arose, was within this power: *Ibid*. As to the question of the repeal of the statute by the Railroad Act of March 12, 1874, the decision of the Supreme Court of Wisconsin was

held binding: *Ibid*. The Alabama Act of April 19, 1873, entitled "An Act regulating the charges for transportation of freight upon railroads," was held unconstitutional so far as it related to the transportation of passengers, such subject not being expressed in its title: *Evans v. Memphis & Charleston R. R. Co.*, 56 Ala. 246, 18 Am. Ry. Rep. 350. See further, *Ruggles v. People*, 91 Ill. 256; *Illinois Cent. R. R. Co. v. People*, 95 Ill. 313; *S. C. 1 Am. & Eng. R. R. Cas.* 188; *Tilley v. Savannah, F. & W. R. R. Co.*, 5 Fed. Repr. 641; *S. C. 1 Am. & Eng. R. R. Cas.* 615; *Stone v. State of Wis.*, 94 U. S. 181; *Union Pac. R. R. Co. v. U. S.*, 99 U. S. 700; *Hinckley v. Chi., M. & St. P. Ry. Co.*, 38 Wis. 194; *State v. Winona & St. Peter R. R. Co.*, 19 Minn. 434; *Cincinnati, Hamilton & Dayton R. R. Co. v. Cole*, 29 Ohio St. 126; *Iron R. R. Co. v. Lawrence Furn. Co.*, *Id.* 208; *State v. Columbus G. L. & C. Co.*, 34 *Id.* 572; *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559. Such provisions are held not to apply to express companies, in *Texas Exp. Co. v. Texas & Pac. Ry. Co.*, 6 Fed. Repr. 426; *S. C. 1 Am. & Eng. R. R. Cas.* 618.

other places in the State having not less than one hundred thousand inhabitants, "in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels can not be accurately preserved."

It is claimed that such a law is repugnant—

1. To that part of sec. 8, Art. 1, of the Constitution of the United States which confers upon Congress the power "to regulate commerce with foreign nations and among the several states;"

2. To that part of sec. 9 of the same article which provides that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another;" and

3. To that part of amendment 14 which ordains that no state shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

We will consider the last of these objections first.

Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional, unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained.

The Constitution contains no definition of the word "deprive," as used in the fourteenth amendment. To determine its signification, therefore, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection.

While this provision of the amendment is new in the Constitution of the United States, as a limitation upon the powers of the states, it is old as a principle of civilized government. It is found in Magna Charta, and, in substance if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the Union. By the fifth amendment, it was introduced into the Constitution of the United States as a limitation upon the powers of the national government, and by the fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states.

When the people of the United Colonies separated from Great

Britain, they changed the form, but not the substance, of their government. They retained for the purposes of government all the powers of the British Parliament, and through their state constitutions, or other forms of social compact, undertook to give practical effect to such as they deemed necessary for the common good and the security of life and property. All the powers which they retained they committed to their respective states, unless in express terms or by implication reserved to themselves. Subsequently, when it was found necessary to establish a national government for national purposes, a part of the powers of the states and of the people of the states was granted to the United States and the people of the United States. This grant operated as a further limitation upon the powers of the states, so that now the governments of the states possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people. The reservations by the people are shown in the prohibitions of the constitutions.

When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. "A body politic," as aptly defined in the preamble of the Constitution of Massachusetts, "is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." This does not confer power upon the whole people to control rights which are purely and exclusively private, *Thorpe v. R. & B. Railroad Co.*, 27 Vt. 143; but it does authorize the establishment of laws requiring each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another. This is the very essence of government, and has found expression in the maxim *sic utere tuo ut alienum non lædas*. From this source come the police powers, which, as was said by Mr. Chief Justice Taney in the *License Cases*, 5 How. 583, "are nothing more or less than the powers of government inherent in every sovereignty, \* \* that is to say, \* \* the power to govern men and things." Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial,

and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property. With the fifth amendment in force, Congress, in 1820, conferred power upon the city of Washington "to regulate \* \* the rates of wharfage at private wharves, \* \* the sweeping of chimneys, and to fix the rates of fees therefor, \* \* and the weight and quality of bread," 3 Stat. 587, sec. 7; and, in 1848, "to make all necessary regulations respecting hackney carriages and the rates of fare of the same, and the rates of hauling by cartmen, wagoners, carmen, and draymen, and the rates of commission of auctioneers," 9 *id.* 224, sect. 2.

From this it is apparent that, down to the time of the adoption of the fourteenth amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property, necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The amendment does not change the law in this particular: it simply prevents the states from doing that which will operate as such a deprivation.

This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be *juris privati* only." This was said by Lord Chief Justice Hale more than two hundred years ago, in his Treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by



the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control.

Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris*, 1 Harg. Law Tracts, 6, the king has "a right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. He may make a ferry for his own use or the use of his family, but not for the common use of all the king's subjects passing that way; because it doth in consequence tend to a common charge, and is become a thing of public interest and use, and every man for his passage pays a toll, which is a common charge, and every ferry ought to be under a public regulation, viz., that it give attendance at due times, keep a boat in due order, and take but reasonable toll; for if he fail in these he is finable." So if one owns the soil and landing-places on both banks of a stream, he can not use them for the purposes of a public ferry except upon such terms and conditions as the body politic may from time to time impose; and this because the common good requires that all public ways shall be under the control of the public authorities. This privilege or prerogative of the king, who in this connection only represents and gives another name to the body politic, is not primarily for his profit, but for the protection of the people and the promotion of the general welfare.

And, again, as to wharves and wharfingers, Lord Hale, in his treatise *De Portibus Maris*, already cited, says: "A man, for his own private advantage, may, in a port or town, set up a wharf or crane, and may take what rates he and his customers can agree for crannage, wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz., makes the most of his own. \* \* \* If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, \* \* \* or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there can not be taken arbitrary and excessive duties for crannage, wharfage, pesage, etc., neither can they be enhanced to an immoderate rate; but the

duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a public interest, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but is affected by a public interest."

This statement of the law by Lord Hale was cited with approbation and acted upon by Lord Kenyon at the beginning of the present century, in *Bolt v. Stennett*, 8 T. R. 606.

And the same has been held as to warehouses and warehousemen. In *Aldnutt v. Inglis*, 12 East, 527, decided in 1810, it appeared that the London Dock Company had built warehouses in which wines were taken in store at such rates of charge as the company and the owners might agree upon. Afterwards the company obtained authority, under the general warehousing act, to receive wines from importers before the duties upon the importation were paid, and the question was, whether they could charge arbitrary rates for such storage, or must be content with a reasonable compensation. Upon this point Lord Ellenborough said (p. 537):—"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms. The question then is, whether, circumstanced as this company is, by the combination of the warehousing act with the act by which they were originally constituted, and with the actually existing state of things in the port of London, whereby they alone have the warehousing of these wines, they be not, according to the doctrine of Lord Hale, obliged to limit themselves to a reasonable compensation for such warehousing. And, according to him, whenever the accident of time casts upon a party the benefit of having a legal monopoly of landing goods in a public port, as where he is the owner of the only wharf authorized to receive goods which happens to be built in a port newly erected, he is confined to take reasonable compensation only for the use of the wharf."

And further on (p. 539):—"It is enough that there exists in

the place and for the commodity in question a virtual monopoly of the warehousing for this purpose, on which the principle of law attaches, as laid down by Lord Hale in the passage referred to [that from *De Portibus Maris* already quoted], which includes the good sense as well as the law of the subject."

And in the same case Le Blanc, J., said (p. 541):—"Then, admitting these warehouses to be private property, and that the company might discontinue this application of them, or that they might have made what terms they pleased in the first instance, yet having, as they now have, this monopoly, the question is, whether the warehouses be not private property clothed with a public right, and, if so, the principle of law attaches upon them. The privilege, then, of bonding these wines being at present confined by the act of Parliament to the company's warehouses, is it not the privilege of the public, and shall not that which is for the good of the public attach on the monopoly, that they shall not be bound to pay an arbitrary but a reasonable rent? But upon this record the company resist having their demand for warehouse rent confined within any limit; and, though it does not follow that the rent in fact fixed by them is unreasonable, they do not choose to insist on its being reasonable for the purpose of raising the question. For this purpose, therefore, the question may be taken to be whether they may claim an unreasonable rent. But though this be private property, yet the principle laid down by Lord Hale attaches upon it, that when private property is affected with a public interest it ceases to be *juris privati* only; and, in case of its dedication to such a purpose as this, the owners can not take arbitrary and excessive duties, but the duties must be reasonable."

We have quoted thus largely the words of these eminent expounders of the common law, because, as we think, we find in them the principle which supports the legislation we are now examining. Of Lord Hale it was once said by a learned American judge,—“In England, even on rights of prerogative, they scan his words with as much care as if they had been found in Magna Charta; and the meaning once ascertained, they do not trouble themselves to search any further.” 6 Cow.(N.Y.) 536, note.

In later times, the same principle came under consideration in the Supreme Court of Alabama. That court was called upon,

in 1841, to decide whether the power granted to the city of Mobile to regulate the weight and price of bread was unconstitutional, and it was contended that "it would interfere with the right of the citizen to pursue his lawful trade or calling in the mode his judgment might dictate;" but the court said, "there is no motive \* \* \* for this interference on the part of the legislature with the lawful actions of individuals, or the mode in which private property shall be enjoyed, unless such calling affects the public interest, or private property is employed in a manner which directly affects the body of the people. Upon this principle, in this state, tavern-keepers are licensed; \* \* \* and the county court is required, at least once a year, to settle the rates of innkeepers. Upon the same principle is founded the control which the legislature has always exercised in the establishment and regulation of mills, ferries, bridges, turn-pike roads, and other kindred subjects." *Mobile v. Yuille*, 3 Ala. N. S. 140.

From the same source comes the power to regulate the charges of common carriers, which was done in England as long ago as the third year of the reign of William and Mary, and continued until within a comparatively recent period. And in the first statute we find the following suggestive preamble, to wit:—"And whereas divers wagoners and other carriers, by combination amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of the trade: Be it, therefore, enacted," etc. 3 W. & M., c. 12, § 24; 3 Stat. at Large (Great Britain), 481.

Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. *New Jersey Nav. Co. v. Merchant's Bank*, 6 How. 382. Their business is, therefore, "affected with a public interest," within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation. It remains only to ascertain whether the warehouses of these plaintiffs in error, and the business which is carried on there, come within the operation of this principle.

For this purpose we accept as true the statements of fact contained in the elaborate brief of one of the counsel of the plaint-

iffs in error. From these it appears that "the great producing region of the West and North-west sends its grain by water and rail to Chicago, where the greater part of it is shipped by vessel for transportation to the seaboard by the Great Lakes, and some of it is forwarded by railway to the Eastern ports. \* \* \* Vessels, to some extent, are loaded in the Chicago harbor, and sailed through the St. Lawrence directly to Europe. \* \* \* The quantity [of grain] received in Chicago has made it the greatest grain market in the world. This business has created a demand for means by which the immense quantity of grain can be handled or stored, and these have been found in grain warehouses, which are commonly called elevators because the grain is elevated from the boat or car, by machinery operated by steam, into the bins prepared for its reception, and elevated from the bins, by a like process, into the vessel or car which is to carry it on. \* \* \* In this way the largest traffic between the citizens of the country north and west of Chicago, and the citizens of the country lying on the Atlantic coast north of Washington, is in grain which passes through the elevators of Chicago. In this way the trade in grain is carried on by the inhabitants of seven or eight of the great states of the West with four or five of the states lying on the sea-shore, and forms the largest part of inter-state commerce in these states. The grain warehouses or elevators in Chicago are immense structures, holding from 300,000 to 1,000,000 bushels at one time, according to size. They are divided into bins of large capacity and great strength. \* \* \* They are located with the river harbor on one side and the railway tracks on the other, and the grain is run through them from car to vessel, or boat to car, as may be demanded in the course of business. It has been found impossible to preserve each owner's grain separate, and this has given rise to a system of inspection and grading, by which the grain of different owners is mixed, and receipts issued for the number of bushels, which are negotiable, and redeemable in like kind, upon demand. This mode of conducting the business was inaugurated more than twenty years ago, and has grown to immense proportions. The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier; the ownership has, therefore, been by private individuals, who have embarked their capital

and devoted their industry to such business as a private pursuit."

In this connection it must also be borne in mind that, although in 1874 there were in Chicago fourteen warehouses adapted to this particular business, and owned by about thirty persons, nine business firms controlled them, and that the prices charged and received for storage were such "as have been from year to year agreed upon and established by the different elevators or warehouses in the city of Chicago, and which rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication." Thus it is apparent that all the elevating facilities through which these vast productions "of seven or eight great states of the West" must pass on the way "to four or five of the states on the seashore," may be a "virtual" monopoly.

Under such circumstances it is difficult to see why, if the common carrier, or the miller, or the ferryman, or the innkeeper, or the wharfinger, or the baker, or the cartman, or the hackney-coachman, pursues a public employment and exercises "a sort of public office," these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very "gateway of commerce," and take toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he \* \* take but reasonable toll." Certainly, if any business can be clothed "with a public interest, and cease to be *juris privati* only," this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts.

We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the General Assembly to pass laws "for the protection of producers, shippers, and receivers of grain and produce," art. 13, sect. 7; and by sect. 5 of the same article, to require all railroad companies receiving and transporting grain in bulk or otherwise to deliver the same at any elevator to which it might be consigned, that could be

reached by any track that was or could be used by such company, and that all railroad companies should permit connections to be made with their tracks, so that any public warehouse, etc., might be reached by the cars on their railroads. This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present "immense proportions," something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here. For our purpose we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the state. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge.

Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner.

It matters not in this case that these plaintiffs in error had built their warehouses and established their business before the regulations complained of were adopted. What they did was from the beginning subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authorities for the common good. They entered upon their business and provided themselves with the means to carry it on subject to this condition. If they did not wish to submit themselves to such interference, they should not

have clothed the public with an interest in their concerns. The same principle applies to them that does to the proprietor of a hackney-carriage, and as to him it has never been supposed that he was exempt from regulating statutes or ordinances because he had purchased his horses and carriage and established his business before the statute or the ordinance was adopted.

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.

As has already been shown, the practice has been otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts, relating to matters in which the public has no interest, what is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.

But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process, but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for serv-



fices rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the fourteenth amendment which is relied upon, viz., that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Certainly, it can not be claimed that this prevents the state from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what can not be done in the one case in this particular can not be done in the other.

We come now to consider the effect upon this statute of the power of Congress to regulate commerce.

It was very properly said in the case of the *State Tax on Railway Gross Receipts*, 15 Wall. 293, that "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution." The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the State of Illinois. They are used as instruments by those engaged in state as well as those engaged in the inter-state commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may become connected with inter-state commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction. We do not say that a case may not arise in which it will be found that a state, under the

form of regulating its own affairs, has encroached upon the exclusive domain of Congress in respect to inter-state commerce, but we do say that, upon the facts as they are presented to us in this record, that has not been done.

The remaining objection, to wit, that the statute in its present form is repugnant to sect. 9, art. 1, of the Constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by the single remark that this provision operates only as a limitation of the powers of Congress, and in no respect affects the states in the regulation of their domestic affairs.

We conclude, therefore, that the statute in question is not repugnant to the Constitution of the United States, and that there is no error in the judgment. In passing upon this case we have not been unmindful of the vast importance of the questions involved. This and cases of a kindred character were argued before us more than a year ago by the most eminent counsel, and in a manner worthy of their well-earned reputations. We have kept the cases long under advisement, in order that their decision might be the result of our mature deliberations.

*Judgment affirmed.*

Chicago, Burlington & Quincy Railroad Co. v. State of Iowa, 4 Otto, 155, 16 Am. Ry. Rep. 169.

PER CHIEF JUSTICE WAITE:

Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in *Munn v. Illinois*, *supra*, p. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters.

The Burlington and Missouri River Railroad Company, the benefit of whose charter the Chicago, Burlington and Quincy Railroad Company now claims, was organized under the general corporation law of Iowa, with power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but being subject, nevertheless, at all times to such rules and regulations as the General Assembly of Iowa might from time to time enact and provide. This is, in substance,

its charter, and to that extent it is protected as by a contract; for it is now too late to contend that the charter of a corporation is not a contract within the meaning of that clause in the Constitution of the United States which prohibits a state from passing any law impairing the obligation of a contract. Whatever is granted is secured subject only to the limitations and reservations in the charter or in the laws or constitutions which govern it.

This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

It is a matter of no importance that the power of regulation now under consideration was not exercised for more than twenty years after this company was organized. A power of government which actually exists is not lost by non-user. A good government never puts forth its extraordinary powers, except under circumstances which require it. That government is the best which, while performing all its duties, interferes the least with the lawful pursuits of its people.

In 1691, during the third year of the reign of William and Mary, Parliament provided for the regulation of the rates of charges by common carriers. This statute remained in force, with some amendment, until 1827, when it was repealed, and it has never been re-enacted. No one supposes that the power to

restore its provisions has been lost. A change of circumstances seemed to render such a regulation no longer necessary, and it was abandoned for the time. The power was not surrendered. That remains for future exercise, when required. So here, the power of regulation existed from the beginning, but it was not exercised until in the judgment of the body politic the condition of things was such as to render it necessary for the common good.

Neither does it affect the case that before the power was exercised the company had pledged its income as security for the payment of debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. After the pledge and after the lease the property remained within the jurisdiction of the state, and continued subject to the same governmental powers that existed before.

The objection that the statute complained of is void because it amounts to a regulation of commerce among the states, has been sufficiently considered in the case of *Munn v. Illinois*. This road, like the warehouse in that case, is situated within the limits of a single state. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as in inter-state commerce, and, until Congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.

It remains only to consider whether the statute is in conflict with sect. 4, art. 1, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and that "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The statute divides the railroads of the state into classes, according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires. The Supreme Court of the state, in the case of *McAunich v. M. & M. Railroad Co.*, 20 Iowa, 343, in speaking of legislation as to classes, said, "These laws are general and uniform, not because they operate upon every per-

son in the state, for they do not, but because every person who is brought within the relation and circumstances provided for is affected by the law. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." This act does not grant to any railroad company privileges or immunities which, upon the same terms, do not equally belong to every other railroad company. Whenever a company comes into any class, it has all the "privileges and immunities" that have been granted by the statute to any other company in that class.

It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done.

*Decree affirmed.*

**3. Right of the state and other authorities to fix rates and tolls.**—Each state has the power to make such laws, either special or general, as it thinks proper, not inconsistent with its own constitution and the Constitution of the United States, for the creation of private corporations to construct works of internal improvement, as railroads and canals, for the transportation of persons and property.<sup>1</sup> They may also charge and receive a bonus therefor, as a consideration for the charter privilege, either as a specific annual sum, or as a percentage on the annual receipts for transportation collected by the company, if such bonus be provided for by a provision of the charter, or by a law of a general nature contemporaneous therewith and entering therein; and the same will not be obnoxious to that clause of the United States Constitution which confers upon Congress the exclusive power to regulate commerce between the states, although the

<sup>1</sup> Balt. & Ohio R. R. Co. v. Maryland, 21 Wall. 456, 471.

effect may be to necessarily increase the rates of fare and transportation to be charged by the corporators to meet the increased expense thus incurred.<sup>1</sup>

The several states may, by a like provision of the charter, or by a like cotemporaneous general law entering therein, limit or regulate, or give power to the corporations to fix, the tolls and rates of fare and transportation to be received by such corporation; and if accepted by organizing under charters, or under general incorporation laws, embodying such provisions, the corporations thus created will be bound thereby.<sup>2</sup> This power in the several states is unlimited and sovereign in its nature, and is a subject of legislative discretion, against the abuse of which the public security is to be found in the responsibility to the people of those for the time being invested with legislative power.<sup>3</sup>

But a charter being a contract, which may not be impaired, then if it gives to the corporation the right to fix its own rates of pay for services to be rendered, and it does so, then the legislatures of the several states, not being, like the British Parliament, omnipotent in point of power, it follows therefrom that such privilege can not be by them restricted or taken away, unless by a law subsequently passed, and accepted by the company, so as to amount to consent thereto.<sup>4</sup> As where, by the law of its creation, or under which it is organized and permitted to have and exercise its corporate entity, franchise and powers, the right exists in the public, through state legislation, to fix and regulate the rates and price of services of transportation, then if the legislature fix the rates, and the company accept

<sup>1</sup> *Balt. & Ohio R. R. Co. v. Maryland*, 21 Wall. 456, 471.

<sup>2</sup> *Balt. & Ohio R. R. Co. v. Maryland*, 21 Wall. 456, 471; *Parker v. Metropolitan R. R. Co.*, 109 Mass. 506, 7 Am. Ry. Rep. 521.

<sup>3</sup> *Balt. & Ohio R. R. Co. v. Maryland*, 21 Wall. 456, 471.

<sup>4</sup> *Story's Comts. on the Constitution*, Secs. 1386, 1387, 1388; *Hartford & New Haven R. R. Co. v. Croswell*, 5 Hill, 383; *Hamilton v. Keith and others*, 5 Bush (Ky.), 458; *S. C. 1 With.'s Corp. Cas.* 549; *Ala. & Flor. R. R. Co. v. Burkett*, 46 Ala. 569;

*Micon and others v. Tallassee Bridge Co.*, 47 Ala. 652, 656; *Wales v. Stetson*, 2 Mass. 146; *Boston & Lowell R. R. Co. v. Salem & Lowell R. R. Co.*, 2 Gray, 34; *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 Cond. R. 519; *State Bank of Ohio v. Knoop*, 16 How. 380; *Ohio Life Ins. & Trust Co. v. Debolt*, 16 How. 428; *Binghamton Bridge Case*, 3 Wall. 73; *Minot v. Phila., Wil. & Baltimore R. R. Co.*, 18 Wall. 206; *Washington Bridge Co. v. The State*, 18 Conn. 64; *Day v. Owen*, 5 Mich. 527.

and consent thereto, by organizing under, or if already organized, thereby taking the benefit of, the statute, such organization, or such acceptance, as the case may be, amounts impliedly to a contract on its part to submit to such regulation; and it is bound thereby as by any other contract, lawful in itself, and made for a valuable consideration.<sup>1</sup> Moreover, the grant or privilege accorded by the law is a consideration valid to bind the company, if thus accepted.<sup>2</sup>

In Wisconsin it is held, under the well known "Potter law" of that state, that a railroad company is bound to deliver freight to a consignee upon a tender of the highest legal charge allowed, although the company may have paid the charges of another company from whom they received the freight, for transporting it over a distance where the first company had no line, and although they would have been entitled to charge and receive the same amount if it had been consigned to them as a point reached by their own line, and they had not been obliged to pay freightage.<sup>3</sup> In cases like this, the total charge should be collected by one company, and divided between them and the connecting line or lines upon some equitable principle.<sup>4</sup>

**4. What action of the company necessary to establish.**—The establishing of rates and fares, from time to time, by a railroad corporation, need not be by action of the board of directors; it may be done by the agents and officers of the company other than the board of directors.<sup>5</sup> Nor must such action necessarily be in writing, or provable by the records;<sup>6</sup> parol evidence thereof will be sufficient.<sup>7</sup>

**5. Right of company to discriminate.**—Railroad corporations may lawfully discriminate between the price of passenger tickets

<sup>1</sup> *Hamilton v. Keith*, 5 Bush (Ky.), 458; S. C. 1 With.'s Corp. Cases, 549; *Parker v. Metropolitan R. R. Co.*, 109 Mass. 506, 7 Am. Ry. Rep. 521.

<sup>2</sup> *Hamilton v. Keith*, *supra*.

<sup>3</sup> *Ackley v. Chicago, Milwaukee & St. Paul Ry. Co.*, 36 Wis. 252, 9 Am. Ry. Rep. 112.

<sup>4</sup> *Ibid.* See *Chicago, M. & St. P. R. R. Co. v. Ackley*, 4 Otto, 179, 16 Am. Ry. Rep. 176, where it is held the company can not recover more than the

maximum rate, by showing that the amount demanded is no more than a reasonable charge.

<sup>5</sup> *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1; *Manchester & Lawrence R. R. Co. v. Fisk*, 33 N. H. 297; *Hilliard v. Goold*, 34 N. H. 230.

<sup>6</sup> *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1.

<sup>7</sup> *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1.

and of passage when payment is made on the cars.<sup>1</sup> They can not, however, legally discriminate between persons; they must all be treated alike.<sup>2</sup>

And so railroad companies may lawfully discriminate in their charges of fares and freights between domestic passengers, and those taken up in and coming into or passing through a state from another state, when allowed by statute, and such discrimination will be legal;<sup>3</sup> though the rates must be uniform as to all persons and things of each particular class.<sup>4</sup> And such, too, we conceive to be the law, as to the right to thus discriminate, wherever the company retains its corporate right to fix its own rates and fares. If, however, from any provision in the charter or law of the charter, or in any other subsequent statute accepted by the company, such privilege of discriminating between local or domestic freights, and freights taken up in and carried into another state, is conferred upon the company, the statute so conferring it is not in contravention of the Constitution of the United States.<sup>5</sup> Such a discrimination is not a personal distinction, and does not deny to any citizen of another, or of any state, any privileges or immunities which it does not deny to the citizens of the state wherein it is exercised.<sup>6</sup>

When by law rates and fares of railroad transportation are subject to statutory regulation, and by the statute it is provided that the "average charges for toll and transportation" of freights shall not exceed a certain rate per mile, it is allowable to the company to impose a charge of more than such rate per mile for some distances and on some articles, and a less rate for others, so that, upon the whole business of freights, the average charge does not, per mile, exceed the average rate limited.<sup>7</sup> In the language of the Supreme Court of Pennsylvania, MERCUR, J., "There is nothing in the act requiring that this adjustment

<sup>1</sup> Indianapolis, Peru & Chi. Ry. Co. v. Rinard, 46 Ind. 293.

<sup>2</sup> Indianapolis, Peru & Chi. Ry. Co. v. Rinard, 46 Ind. 293.

<sup>3</sup> Shipper *et al.* v. Pennsylvania R. Co., 47 Penn. St. (11 Wright), 338.

<sup>4</sup> Shipper *et al.* v. Pennsylvania R. Co., 47 Penn. St. 338, 341; Sandford

v. Catawissa, W. & E. R. R. Co., 24 Penn. St. (12 Harris), 378.

<sup>5</sup> Shipper and another v. The Pennsylvania R. R. Co., 47 Penn. St. (11 Wright), 338.

<sup>6</sup> Shipper and another v. The Pennsylvania R. R. Co., 47 Penn. St. 338.

<sup>7</sup> Hersh v. Northern Cent. R. W. Co., 74 Penn. St. 181.



should be so made as to bear equally upon each individual without regard to kind of freight or distance."<sup>1</sup>

In an action under the Illinois statute of May 2, 1873, for unjust discrimination and extortion by a railway company, it is necessary to aver that freights for which a certain tariff was charged were "of like quantity of the same class" as those for which a less tariff was charged;<sup>2</sup> that a schedule of reasonable tariff had been established in accordance with the statute, and that defendant had charged and received compensation in excess of such tariff.<sup>3</sup>

Laws against discrimination do not apply to freight transported over other railroads, for whom the defendant acts as a collecting agent; they only affect freight transported by the defendant as a common carrier over its own road.<sup>4</sup>

**6. Rates and fares of lessees.**—A railroad corporation, lessee of another company's railroad, and operating the same, takes to itself all the rights of, and becomes liable to all the burdens appertaining to, the lessors, as to the user of the road, or which it was subject to at the time of making the lease. The lessee may fix its own rates of transportation and fares over the road thus leased by it, irrespective of its own rates and fares over its own road, and irrespective of the rates and fares previously fixed or exacted by the lessors over the road thus leased, to the same extent as the lessors had power in law to fix the same.<sup>5</sup>

**7. Over-charges and violations of rate laws.**—Railroad corporations holding themselves out as common carriers are bound to carry for all alike, and for a reasonable compensation, such persons and property as are offered for transportation, and are suitable to be carried, provided payment therefor be made or tendered.<sup>6</sup>

If unreasonable or exorbitant charges be claimed or demanded

<sup>1</sup> *Hersh v. Northern Cent. R. W. Co.*, 74 Penn. St. 181, 190.

<sup>2</sup> *Chicago, Burlington & Quincy R. Co. v. The People*, 77 Ill. 443, 8 Am. Ry. Rep. 92.

<sup>3</sup> *Chicago, Burlington & Quincy R. Co. v. The People*, *supra*.

<sup>4</sup> *Comm. v. Worcester & Nashua R. R. Co.*, 124 Mass. 561, 18 Am. Ry. Rep. 418.

<sup>5</sup> *Penn. R. R. Co. v. Sly*, 65 Penn. St. 205; *Fisher v. N. York Central & Hudson River R. R. Co.*, 46 N. Y. 644.

<sup>6</sup> *Merriam v. Hartford & N. Haven R. R. Co.*, 20 Conn. 354; *Jordan v. Fall River R. R. Co.*, 5 Cush. 69; *New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 How. 344.

by the company, and are tacitly acquiesced in and paid without protest by the party seeking the service, and there is no rule of law but that of the common law, the party thus paying has no right of action for the excess so paid, although the amount paid be more than a reasonable compensation, if there be no mistake, deception or fraud. It is what in law is termed a voluntary payment, and no part of it can be recovered back; for a party may not only agree as to what is reasonable, but may also agree to pay more than is reasonable, if he thinks proper, and having done so, can have no action therefor.<sup>1</sup> He is not bound, however, to pay an unreasonable price, but may have his action against the carrier for refusing to carry for a reasonable compensation.<sup>2</sup> The measure of damages, however, is a different question, and may be influenced by the conduct of the party himself in respect to the losses resulting therefrom. He must still care for his goods, and as compensatory damages, will only be allowed such as naturally and directly result from the refusal to receive and carry for a reasonable price. On the other hand, he may pay the amount demanded, however exorbitant, protesting against the same at the time, clearly and distinctly, for excessiveness, and afterward, if the matter stands as at common law, may have his action against the carrier for the excess, and recover for the same.<sup>3</sup>

<sup>1</sup> *Arnold & Du Bose v. The Georgia R. R. & Banking Co.*, 50 Geo. 304, 303; *Potomac Coal Co. v. The Cumberland & Penn. R. R. Co.*, 38 Md. 226; *Hall v. Shultz*, 4 John. 240; *Fleetwood v. City of N. Y.*, 2 Sandf. 475; *New York & Harlem R. R. Co. v. Marsh*, 12 N. Y. 312; *Elliott v. Swartwout*, 10 Pet. 153; *Maillard v. Lawrence*, 3 Blatch. C. C. 378; *Kriesler v. Morton*, 2 Curt. 239. If the company receipts for goods to be transported to a point beyond its line for a fixed sum, and the consignor is charged a larger sum, it is liable for the excess: *Detroit & Bay City Ry. Co. v. McKenzie*, 43 Mich. 609; *S. C. 5 N. W. Repr.* 1031, 21 Am. Ry. Rep. 157. A variance in describing the defendant's undertaking as one to carry the whole dis-

tance, is immaterial: *Ibid.* If, in consideration of unexpected difficulties occurring in the transportation, the consignor agrees to, and does, pay an additional sum for the carriage, he can not recover it back: *Ibid.*

<sup>2</sup> *Angell on Carriers*, sec. 124; *Merriam v. Hartford & New Haven R. R. Co.*, 20 Conn. 354; *Pickford v. Grand Junction R. W. Co.*, 8 M. & Welsb. Reps. 372; *Crouch v. Great Northern R. W. Co.*, 34 Eng. L. & Eq. Reps. 573.

<sup>3</sup> *Beatty v. United States, Devereux* (U. S. Ct. of Clms.), 231; *Sturges v. United States, Devereux* (U. S. Ct. of Clms.), 244; *Bend v. Hoyt*, 13 Pet. 263; *Griswold v. Lawrence*, 1 Blatch. C. C. 599; *Drake v. Redfield*, 4 Blatch. C. C. 116; *Swartwout v. Gihon*, 3 How. 110; *Maxwell v. Griswold*, 10 How. 242.

And so, if excess of compensation be paid by mistake;<sup>1</sup> but not for mere mistake of law.<sup>2</sup>

The protest, as well in case of exorbitant charges over reasonable compensation at common law, as in cases of excessive payments over the amount allowed by statute, should be explicit, and should give notice of the intention to sue for recovery back of the amount in either case overpaid, especially if payment is made to an agent.

If, however, the amount of compensation is limited by statute, and no remedy against the party taking it is provided, and no penalty is imposed for the taking of it, then the party of whom an excessive charge or compensation is demanded for services as common carrier may pay the same under protest, and afterward by an action recover back the excess paid over and above the sum allowed by the statute. But if the statute creates new rights and limitations, and not only limits the amount of compensation, but also imposes a penalty on the party taking it, to be recovered by and for the benefit of the party making the payment, and nothing be said as to a separate action for the over-charge, then if such penalty be of a character sufficient to indemnify and make whole the injured party, he can not, in addition thereto, have an action also for the excess, for this would be to give a double remedy. As, for instance, to illustrate the subject, where the penalty given was a number of times the excess of rates demanded and received, it is held that such penalty is inclusive of the excess, and no further action or remedy exists or can be maintained by the injured party, for that full redress is given by the penalty itself.<sup>3</sup> But, on the other hand, where by statute the penalty im-

<sup>1</sup> *Baltimore & Susquehanna R. R. Co. v. Faunce*, 6 Gill (Md.), 68.

<sup>2</sup> *Elliott v. Swartwout*, 10 Pet. 153; *United States v. Clement*, Crabbe, 499; *Corkle v. Maxwell*, 3 Blatch. C. C. 413.

<sup>3</sup> Sedg. on Stat. and Const. Law, 94, 95, 96, 404; *Thurston v. Prentiss et al.*, 1 Mich. 196; *Gedney v. The Inhabitants of Tewksbury*, 3 Mass. 307; *City of Boston v. Shaw*, 1 Met. (Mass.), 130; *Crosby v. Bennett*, 7 Met. (Mass.),

17; *Almy v. Harris*, 5 John. R. 175; *Smith v. Lockwood*, 13 Barb. 209; *Moncrief v. Ely*, 19 Wend. 405; *Lang v. Scott*, 1 Blackf. 405; *Cameron v. Baker*, 1 Carr. & Payne, 268. "The statute gives the only remedy, and the parties are confined to it": *Wing, J.*, 1 Mich. 201. "It is a substitute for the remedy at common law": *Shaw, C. J.*, *Crosby v. Bennett*, 7 Met. 17, 19. The rule formerly as to recovery also of the excess

posed is a fixed sum, or sums limited within certain amounts, and yet nothing be said about an additional action for recovery back of the net amount of excess paid, such action may be sustained, for the reason that the penalty fixed by law might not in all cases indemnify the party: as in some instances the amount paid in excess might be greater than the penalty, so as to still

was in cases where the act was *malum prohibitum*, or in itself illegal and expressly so: SHAW, C. J. *Ib.* In the case above cited from 1 Mich. 196, *Thurston v. Prentiss*, the statute gave a penalty for taking usurious interest, of three-fold the usury taken, but did not declare the contract void. WING, J.: The statutory remedy "must be strictly pursued," and none other can be had. Same ruling in *Crosby v. Bennett*, 7 Met. 17. In this last cited case the court say: "The right to recover back three times the amount of the usurious interest paid, is given by statute to the party who has paid, and is partly in nature of an equitable action to recover back money which the defendant can not conscientiously and justly retain, and partly in nature of a penalty. So far as it affords a remedy to recover back money wrongfully taken, it is a substitute for the remedy at common law." \* \* The statutory limitation is different as to these two remedies, and if a different one be permitted than that given by the statute, then the court say, the limitation as to an action for the statute penalty would be evaded. In *Lang v. Scott*, the court say: "If a statute is introductory of new rights which did not before exist in the country, and prescribes a penalty for their violation, the persons claiming under the act must depend, for the security of the rights thus claimed, upon the provisions therein specified." But "When there is a pre-existing right at common law, and an affirma-

tive statute intervenes inflicting a new penalty, the law is otherwise." BLACKFORD, J., 1 Blackf. 405. In such case, if the penalty given by statute has been lost by the repeal of the statute, in an action brought under the statute to recover such penalty, there can be no recovery, as in a common law action, for the excess of such charges above reasonable rates, at least without amendment of the complaint: *Streeter v. Chicago, Milwaukee & St. Paul Ry. Co.*, 44 Wis. 383, 18 Am. Ry. Rep. 196. The questions whether the common law action was suspended by the statutory substitute, whether the repeal of the statute restored the common law action in cases occurring under the statute, and whether the rates fixed by statute would be taken as the standard of reasonable rates, were adverted to, but not decided: *Ibid.* See, to same effect, *Smith v. Chicago & Northwestern Ry. Co.*, 43 Wis. 686; and Same Case on another appeal, after amendment of the complaint, in 49 Wis. 443, 1 Am. & Eng. R. R. Cas. 303. It was held in the latter case that the question whether an action would lie under the amended complaint for the illegal excess simply, was not *res adjudicata*; and the excessive charges being alleged in the amended complaint to have been made "wrongfully and fraudulently," the action was still in tort, and the amendment was properly allowed. It was also held that the common law action was not repealed or suspended by the statute.

leave the injured party without full redress.<sup>1</sup> This latter ruling being contrary to the general doctrine on the subject, and based upon the single, but plausible, reason above stated, it follows that to sustain an action on such grounds, or to make the ruling in that respect a precedent, the case to be decided must be one in which the reason above given clearly applies; for when the reason of the law ceases, the law itself ceases to exist in the particular case.

**8. Drawbacks on freights.**—Railroad companies may lawfully make contracts to refund to a shipper a certain portion of the stipulated or established freight, by the name of drawbacks or rebates;<sup>2</sup> but an agreement not to allow the same drawback to others is against public policy and void.<sup>3</sup> But if such objectionable part of the contract is severable, it will not affect the validity of the entire contract.<sup>4</sup>

Such a contract will be held to apply only to future shipments, unless expressed to the contrary.<sup>5</sup> And where such a contract is entered into with an agent of the company for that purpose only, with knowledge on the part of the shipper that, by the ordinary routine of business, the money for drawbacks would come to him through the hands of such agent, and to that routine the shipper assented, it was held that the agent of the company became the agent of the shipper for the purpose of receiving the money.<sup>6</sup>

<sup>1</sup> Fuller v. The Chicago & N. W. R. R. Co., 31 Iowa, 187; Salem Turnpike & C. B. Co. v. Hayes, 5 Cush. 458.

<sup>2</sup> Toledo, Wabash and Western R. W. Co. v. Elliott, 76 Ill. 67; Stewart v. Lehigh Valley R. R. Co., 38 N. J. 505, 13 Am. Ry. Rep. 54.

<sup>3</sup> Stewart v. Lehigh Valley R. R. Co., 38 N. J. 505, 13 Am. Ry. Rep.

54.

<sup>4</sup> Stewart v. Lehigh Valley R. R. Co.

<sup>5</sup> Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Fawsett, 56 Ill. 513, 4 Am. Ry. Rep. 405.

<sup>6</sup> Pittsburgh, F. W. & C. Ry. Co. v. Fawsett, *supra*.

## CHAPTER LXI.

### RAILROAD EARNINGS.

	Section.		Section.
Are not the property of the stockholders individually, except as in dividends declared . . .	1	pany . . . . .	2
May be mortgaged by the com-		The receipts and earnings thus mortgaged, can not be taken by garnishee process \ . . .	3

**1. Are not the property of the stockholders individually, except as in dividends declared.**—The net earnings, of the company are under the control of the directory, for the legitimate purposes of the corporation, and are not the property of the stockholders individually until a dividend thereof is declared, and only so then to the extent of the dividend.<sup>1</sup> The company, through their directory, may invest it in betterments of the road, at their discretion, as in buildings, machinery, railroad tracks, depots, rolling stock, or other permanent improvements for enlarging or carrying on the business of the company. If so invested, it becomes an accretion to the capital, and is represented by the increased value of the capital stock occasioned thereby. And so it is if shares of capital stock be issued as a dividend, to the same amount therefor, to the stockholders in lieu of the money dividend itself. In such latter case, the new issues of stocks are not what is termed “watered stocks,” but are a legitimate issue for value received by the company in money, and added to the improvements of the road.<sup>2</sup>

As money thus re-invested in the road becomes an increase

<sup>1</sup> *Williston v. Mich. S. & N. Indiana R. R. Co.*, 13 Allen, 400; *Boston & Lowell R. R. Co. v. The Commonwealth*, 100 Mass. 399; S. C. 1 Withrow’s Corp. Cas. 638, 642; *Minot v. Paine and others*, 99 Mass. 101; S. C. 1 Withrow’s Corp. Cas. 597; *Goodwin v. Hardy*, 57 Maine, 143; *March*

*v. Railroad Co.*, 43 N. H. 520. They are held in trust by the officers for the payment of the debts: *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush, 673, 18 Am. Ry. Rep. 221.

<sup>2</sup> *Minot v. Paine and others*, 99 Mass. 101.

of capital, it follows that the increased stocks issued to represent the same are part of the capital invested, and are not to be accounted as income to the stockholders receiving the same.<sup>1</sup> Therefore, where stocks are holden in trust for one person to receive the income thereof for life, with a remainder over of the whole interest or capital stock itself to another person, such newly created stock is accounted as so much principal or capital, upon which the beneficiary for life will receive the annual dividends of money; but the new stock itself goes over, with the original stock, to the remainder man, at the death of the person entitled to the income for life.<sup>2</sup>

Dividends inure to those persons who own the shares of capital stock at the time at which they are declared;<sup>3</sup> and though they remain uncollected, they do not pass to a purchaser of the stock by a sale made thereafter,<sup>4</sup> unless the right to them be expressly included in the purchase, and be properly transferred. The subsequent purchaser of the mere shares of stock takes the right to only such dividends thereof as shall accrue and be declared while he is the owner of the stock.<sup>5</sup> Such dividends are incident to the shares, to which a purchaser becomes entitled, provided he remains the owner thereof until the dividend is made.<sup>6</sup>

**2. May be mortgaged.**—The net proceeds of the receipts and earnings of a railroad corporation, remaining over as profits, may be mortgaged, and this, too, in advance of the actual construction of the road; and it is no objection thereto that they are not *in esse* at the time of making the mortgage. And when a mortgage is legally executed, and in good faith, upon a railroad, including a provision that after the road and its branches shall be completed and in operation, the company shall, after paying

<sup>1</sup> Minot v. Paine and others, 99 Mass. 101; S. C. 1 Withrow's Corp. Cas. 597.

<sup>2</sup> Minot v. Paine and others, 99 Mass. 101; S. C. 1 Withrow's Corp. Cas. 597, 606.

<sup>3</sup> Goodwin v. Hardy, 57 Maine, 143; March v. R. R. Co., 43 N. H. 520; Jones v. Terre Haute & Richmond R. Co., 29 Barbour, 353; S. C. 57 N. Y. 196; Brundage v. Brundage, 65 Barb. 397; S. C. 1 Thomp. & C. 82; Hill v. Newichawanick Co., 48 How.

Pr. 427; Cent. R. R. & Bkg. Co. v. Papot, 59 Ga. 342; Ryan v. Leav., A. & N. W. Ry. Co., 21 Kans. 402; Black v. Homersham, L. R. 4 Exch. Div. 24.

<sup>4</sup> Goodwin v. Hardy, 57 Maine, 143; March v. Railroad Co., 43 N. H. 520.

<sup>5</sup> Goodwin v. Hardy, 57 Maine, 143; March v. Railroad Co., 43 N. H. 520; Burroughs v. North Carolina R. R. Co., 67 N. C. 376.

<sup>6</sup> Goodwin v. Hardy, 57 Maine, 143; March v. Railroad Co., 43 N. H. 520.

out of the gross earnings the necessary expenses of operating the road and keeping it and its equipments in repair, and the necessary expenses of the company, and all taxes, pay over to the mortgage creditor the remainder of such gross earnings, to be by such creditor applied on the interest of the mortgage deed, such mortgage will be protected and enforced in the courts.<sup>1</sup>

**3. The receipts and earnings thus mortgaged can not be taken by garnishee process.**—The receipts and earnings of a railroad corporation thus legally mortgaged, can not be intercepted by process of garnishment, or other legal process, against the company, in favor of other creditors, to the prejudice or postponement of the claim of the mortgage creditor.<sup>2</sup>

In case of interference with such receipts and earnings by process of garnishment, or other legal process, in a manner to prevent their payment and application on the mortgage debt, and with a view to apply the same on the claims of other persons than the mortgage creditors and their claims covered by the mortgage, a court of equity will, upon proper application, interfere by injunction, and prevent the same from being done. They belong to the lien creditors for whom, by the mortgage, they are set apart, and they have a right to have them applied in liquidation of their lien demands.<sup>3</sup>

<sup>1</sup> *Jessup v. Bridge*, 11 Iowa, 572; *Dunham v. Isett*, 15 Iowa, 284; *Philips v. Winslow*, 18 B. Mon. 431.

<sup>2</sup> *Jessup v. Bridge*, 11 Iowa, 572; *Dunham v. Isett*, 15 Iowa, 284; *Galena & Chicago Union R. R. Co. v. Men-*

*zies*, and *Martin and another v. Menzies*, 26 Ill. 121; *Parkhurst v. Northern Central R. R. Co.*, 19 Md. 472.

<sup>3</sup> *Galena & Chicago Union R. R. Co. v. Menzies*, and *Martin and another v. Menzies*, 26 Ill. 121.



## CHAPTER LXII.

### INJURIES TO LIVE STOCK.

	Section.		Section.
At common law . . . . .	1	Liability as for double damages under the statute . . . . .	4
Under the statute, as for want of a fence . . . . .	2	Liability for injuries when road is in the hands of a receiver . . . . .	5
Under the statute, as for a defective fence . . . . .	3		

**1. At common law.**—We here use the term, at common law, not only in reference to the common law doctrine as applicable to live stock injured while running at large in England, or the English doctrine of the common law in that respect, but also the common law upon that subject of such of the particular states of America wherein there is no statutory regulation on the subject.

At common law, no one is bound to fence their grounds;<sup>1</sup> but each one is bound to keep their live stock up, and in default thereof become liable for injuries and depredations committed by them while running at large.<sup>2</sup> Stock thus running at

<sup>1</sup> N. Y. & Erie R. R. Co. v. Skinner, 19 Penn. St. (7 Harris), 298; Drake v. Phil. & E. R. R. Co., 51 *Ib.* 240; Penn. R. R. Co. v. Riblet, 66 *Id.* 164; Locke v. 1st Div. St. Paul & Pacific R. Co., 15 Minn. 350; Perkins v. Eastern R. R. Co., 29 Me. 307; Chapin v. Sullivan R. R. Co., 39 N. H. 53; Morse v. Rutland & Burlington R. R. Co., 27 Vt. 49; Eames v. Salem & L. R. R. Co., 98 Mass. 560; Corwin v. N. Y. & Erie R. R. Co., 13 N. Y. 46.

<sup>2</sup> N. Y. & Erie R. R. Co. v. Skinner, 19 Penn. St. (7 Harris), 298; Wattson v. R. R. Co., 7 Phil. Rep. 249; Terre Haute, Alton & St. Louis R. R. Co. v. Augustus, 21 Ill. 186; Louisville & Nashville R. R. Co. v. Wainscott, 3

Bush (Ky.), 149; Indianapolis, Cincinnati & Lafayette R. R. Co. v. Harter, 38 Ind. 557, 10 Am. Ry. Rep. 247; Cincinnati, Hamilton & Dayton R. R. Co. v. Street, 50 Ind. 225; Detroit, E. R. & I. R. R. Co. v. Barton, 61 Ind. 293; Kuhn v. C., R. I. & P. R. Co., 42 Ia. 420; Pitzner v. Shinnick, 39 Wis. 129. But if seen upon the track, and the train can be safely checked in its speed so as to avoid injuring the animals, it is the duty of the engineer to do so: Pryor v. St. Louis, Kansas City & Northern Ry. Co., 69 Mo. 215; Toledo, Peoria & Warsaw Ry. Co. v. Bray, 57 Ill. 514, 10 Am. Ry. Rep. 441; Paris & Decatur R. R. Co. v. Mullins, 66 Ill. 526; Chicago & Alton R. R. Co. v. Kellam, 92 Ill. 245.

large are trespassers;<sup>1</sup> and there is no liability for injuries thereto, unless when they are wanton, or are caused by negligence.<sup>2</sup> Under such circumstances, though a train of cars or railroad locomotive may not wantonly or of purpose run down and injure live stock found upon the track, yet the company are under no obligation in law to the owner of such stock to slacken its speed, or to make other efforts to avoid the possibility of their bounding onto the road, when they are seen feeding by the wayside thereof.<sup>3</sup>

Though in many of the American states, by a sort of common law or usage, live stock are free commoners, and thus having a right to be at large, are therefore not trespassers in going onto an uninclosed railroad, or other uninclosed grounds,<sup>4</sup> yet no ob-

<sup>1</sup> *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. (7 Harris), 298.

<sup>2</sup> *Cincinnati, Hamilton & Indianapolis R. R. Co. v. Bartlett*, 58 Ind. 572, 19 Am. Ry. Rep. 17; *Darling v. Boston & Albany R. R. Co.*, 121 Mass. 118; *Atchison, Topeka & Santa Fe R. R. Co. v. Hegwir*, 21 Kans. 622; *Denver & Rio Grande R. W. Co. v. Olsen*, 4 Col. 239; *Balt. & Ohio R. R. Co. v. Mulligan*, 45 Md. 486; *Witherell v. Mil. & St. Paul R. W. Co.*, 24 Minn. 410; *Kentucky Cent. R. R. Co. v. Lebus*, 14 Bush, 518; *Nashville & Chattanooga R. R. Co. v. Anthony*, 1 Lea (Tenn.), 516. But the fact that the track was unfenced, and that the train was running faster than usual, and was not slackened, nor any alarm given, will not be evidence of a malicious or willful act: *McCandless v. Chicago & North Western Ry. Co.*, 45 Wis. 365, 19 Am. Ry. Rep. 374.

<sup>3</sup> *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. (7 Harris), 298; *White v. Utica & B. R. R. Co.*, 15 Hun, 333; *Darling v. B. & A. R. R. Co.*, *supra*; *Balt. & O. R. R. Co. v. Mulligan*, *supra*; *Durham v. Wilmington & Weldon R. R. Co.*, 82 N. Car. 352; *Memphis & Charleston R. R. Co. v. Lyon*, 62 Ala. 71. But see *Pryor v.*

*St. Louis, Kansas City & Northern R. W. Co.*, 69 Mo. 215. But otherwise, if such speed is in excess of the rate prescribed by statute: *Toledo, Peoria & Warsaw Ry. Co. v. Deacon*, 63 Ill. 91; *Indianapolis & St. Louis R. R. Co. v. Peyton*, 76 Ill. 340; *Monahan v. Keokuk & Des Moines Ry. Co.*, 45 Ia. 523; *Houston & Tex. Cent. Ry. Co. v. Terry*, 42 Tex. 451.

<sup>4</sup> *Kerwhacker v. The Cleveland, Columbus & Cin. R. R. Co.*, 3 Ohio St. 172; *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 156; *New Orleans, Jackson & Great Northern R. R. Co. v. Field*, 46 Miss. 573; *Danner v. S. Car. R. R. Co.*, 4 Rich. 329; *Murray v. S. Car. R. R. Co.*, 10 Rich. Law, 227; *Locke v. 1st Div. St. Paul & Pacif. R. R. Co.*, 15 Minn. 350; *Jenkins v. The N. Orleans, Opelousas & Great Western R. R. Co.*, 15 La. An. 118; *Knight v. N. Orleans, Opelousas & Great Western R. R. Co.*, 15 La. An. 105; *Walsh v. Virginia & Truckee R. R. Co.*, 8 Nev. 110; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595; *Memphis & Charleston R. R. Co. v. Smith*, 9 Heisk. 860, 20 Am. Ry. Rep. 60; *Burgwyn v. Whitfield*, 81 N. Car. 261.

ligation, by reason thereof, rests upon the railroad company to fence its road against the intrusion of such animals.<sup>1</sup> The obligation to fence exists only by statute; so that where there is no statute requiring fences, or otherwise affecting the liability of railroad corporations for injuries inflicted upon live stock upon their roads, their liability is to be determined upon the principles of the common law as it exists in those several states, and the company are only liable as for willful wrong or negligence.<sup>2</sup>

In Mississippi, cattle are free commoners; the common law rule of fencing them in the owner's inclosure does not there prevail, and they are not trespassers in going on uninclosed grounds. The owner of such premises is not prevented thereby from pursuing his lawful business thereon, but must at the same time observe ordinary care to avoid injury to the live stock of others straying upon such grounds. Therefore, if railroads be uninclosed, then the owners thereof, although not in law bound to fence the same, must, in running their trains, use due and ordinary care to avoid injury to live stock found upon the track;<sup>3</sup> and if live stock be injured thereon, the only defense is that it was unavoidable by the use of such skill and care as a prudent person usually would use in like cases.<sup>4</sup> And if in Mississippi there be mutual fault, yet if that of plaintiff's is remote, and defendant's is proximate, the plaintiff may recover; and if the injury be

<sup>1</sup> *Kerwacker v. The Cleveland, Columbus & Cin. R. R. Co.*, *supra*; *Locke v. 1st Div. St. Paul & Pacif. R. Co.*, 15 Minn. 350; *Indianapolis, Cincinnati & Lafayette R. R. Co. v. Harter*, 38 Ind. 557, 10 Am. Ry. Rep. 247.

<sup>2</sup> *Kerwacker v. The Cleveland, Columbus & Cin. R. R. Co.*, *supra*; *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 156; *Murray v. S. Carolina R. R. Co.*, 10 Rich. Law, 227; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595, 13 Am. Ry. Rep. 153; *Kuhn v. C., R. I. & P. Ry. Co.*, 42 Ia. 420; *Kaes v. Mo. Pac. Ry. Co.*, 6 Mo. App. 397; *Ga. R. R. & B. Co. v. Neely*, 56 Ga. 540.

<sup>3</sup> *Vicksburg & Jackson R. R. Co. v.*

*Patton*, 31 Miss. 156; *New Orleans, Jackson & Great Northern R. R. Co. v. Field*, 46 Miss. 573. And see *Chi. & Alton R. R. Co. v. Engle*, 84 Ill. 397; *Kuhn v. Chi., R. I. & P. R. R. Co.*, 42 Ia. 420; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595; *Coyle v. Balt. & Ohio R. R. Co.*, 11 W. Va. 94; *Kaes v. Mo. Pac. Ry. Co.*, 6 Mo. App. 397; *Ga. R. R. & B. Co. v. Neely*, 56 Ga. 540.

<sup>4</sup> *New Orleans, Jackson & Great Northern R. R. Co. v. Field*, 46 Miss. 573. But, in said state, the owner of stock thus allowed to run at large in the vicinity of a railroad, takes the risk of their injury by unavoidable accidents: *Raiford v. Miss. Cent. R. R. Co.*, 43 Miss. 233.

willful or negligence great, exemplary damages may be given. So, when the latter point is involved, the reckless character of the employe or servant may be proven.<sup>1</sup>

And so cattle are free commoners in Georgia, and therefore turning them out, though near to a railroad and near to car time, is not necessarily an act of negligence on the part of the owner;<sup>2</sup> nor are they there trespassers by going onto the track of a railroad.<sup>3</sup>

But as to liability for their injury, the ruling in Georgia is, that to render the company liable for live stock injured upon the track, it must be shown to be the result of gross negligence on the part of the company.<sup>4</sup> And if the animals belong to the land holder adjoining to where they got onto the road, and he was allowed and paid an additional compensation for fencing in assessing for the right of way, and has omitted to fence, by reason of which omission, or want of a fence, the animals more easily got upon the track of the railroad, then these facts may be shown in evidence on the part of the defense.<sup>5</sup>

The offer of an agent of the company to pay a certain sum for an injury, made without denying liability, and refused by the injured party merely on the ground of being too little compensation, so that the amount of compensation alone remains the subject of contention, may be sufficient, in an action for the injury, when proven, to place the burden of proof on the de-

<sup>1</sup> *Vicksburg & Jackson R. R. Co. v. Patton*, 31 Miss. 156; *Hearne v. Southern Pac. R. R. Co.*, 50 Cal. 482; *State v. Manchester & L. R. R. Co.*, 52 N. H. 528; *Richmond & Danville R. R. Co. v. Anderson*, 31 Gratt. 812; *Chi. & Alton R. R. Co. v. Becker*, 76 Ill. 25; *Manly v. Wilmington & Weldon R. R. Co.*, 74 N. Car. 655; *Karle v. Kansas City, St. Jos. & C. B. R. R. Co.*, 55 Mo. 476; *Frick v. St. Louis, Kansas City & Northern Ry. Co.*, 5 Mo. App. 435; *Meyer v. Lindell Ry. Co.*, 6 *Id.* 27; *Thirteenth & F. Sts. Pass. Ry. Co. v. Boudrou*, 92 Penn. St. 475; *S. C.* 10 Repr. 156.

<sup>2</sup> *Macon & Western R. R. Co. v. Lester*, 30 Ga. 911; *Macon & Western*

*R. R. Co. v. Baber*, 42 Geo. 300. And see *Memphis & Charleston R. R. Co. v. Smith*, 9 Heisk. 860, 20 Am. Ry. Rep. 60.

<sup>3</sup> *Macon & W. R. R. Co. v. Baber*, *supra*.

<sup>4</sup> *Georgia R. R. & Banking Co. v. Anderson*, 33 Geo. 110; *Macon & Augusta R. R. Co. v. Vaughn*, 48 Ga. 464, 11 Am. Ry. Rep. 387. But see *Central Branch R. R. Co. v. Phillipi*, 20 Kans. 9, 19 Am. Ry. Rep. 99, that no allegation of gross negligence is necessary in the bill of particulars, where it discloses no negligence on the part of the plaintiff.

<sup>5</sup> *Georgia R. R. & Banking Co. v. Anderson*, 33 Geo. 110.

fendant to show the case to have been such as creates no liability on the company.<sup>1</sup>

If, in Virginia, live stock is on the road without fault of the owner, the company are bound to use reasonable care to avoid their injury.<sup>2</sup> In the case last cited the court forbear to decide, as it did not become necessary, as to the duty of the company if the owner be in fault.

And in Ohio, where formerly live stock were free commoners, in a case early in the history of railroads in that state, the relative rights and duties of railroad corporations and the owners of live stock are extensively discussed, and it was settled as law in that state, that live animals being free commoners, and allowed by law to go at large, are not trespassers in going upon uninclosed grounds, including railroads, and neither are their owners in allowing them so to do;<sup>3</sup> that though they have a right to go at large, and on to uninclosed grounds as aforesaid, yet it is at the owner's own risk, as to mere accidents that may befall them to their injury;<sup>4</sup> that though such animals on the premises of a railroad corporation are there at their own risk, as to mere accidents, yet they may not be there wantonly or negligently injured by the company, but that the latter are bound to use ordinary care to avoid their injury, so far as may be consistent under the circumstances of the paramount obligation of the company to care first for the safety of trains and passengers;<sup>5</sup> that there is in said state no greater obligation on railroad corporations to

<sup>1</sup> Georgia Railroad & Banking Co. v. Willis, 28 Geo. 317.

<sup>2</sup> Trout v. The Virginia & Tenn. R. R. Co., 23 Gratt. 619.

<sup>3</sup> Kerwhacker v. The Cleveland, Columbus and Cincinnati R. R. Co., 3 Ohio St. 172; Cleveland, Columbus & Cin. R. R. Co. v. Elliott, 4 Ohio St. 474, 475; Central Ohio R. R. Co. v. Lawrence, 13 Ohio St. 66; Cranston v. Cincinnati, Hamilton & Dayton R. R. Co., 1 Handy (Ohio), 193.

<sup>4</sup> Kerwhacker v. The Cleveland, Columbus and Cincinnati R. R. Co., 3 Ohio St. 172; Cleveland, Columbus & Cin. R. R. Co. v. Elliott, 4 Ohio St. 474, 475; Central Ohio R. R. Co. v.

Lawrence, 13 Ohio St. 66.

<sup>5</sup> Kerwhacker v. The Cleveland, Columbus & Cincinnati R. R. Co., 3 Ohio St. 172; Cincinnati, Hamilton & Dayton R. R. Co. v. Waterson, 4 Ohio St. 424; Cleveland, Columbus & Cin. R. R. Co. v. Elliott, 4 Ohio St. 474, 475; Central Ohio R. R. Co. v. Lawrence, 13 Ohio St. 66; Cincinnati & Zanesville R. R. Co. v. Smith, 22 Ohio St. 227. And see Balt. & Ohio R. R. Co. v. Mulligan, 45 Md. 486; Witherell v. Milw. & St. Paul Ry. Co., 24 Minn. 410; Ky. Cent. R. R. Co. v. Lebus, 14 Bush, 518; Nashville & Chattanooga R. R. Co. v. Anthony, 1 Lea (Tenn.), 516.

fence their roads than on private individuals to inclose their grounds, but that if left uninclosed, it is at the risk of intrusion from animals going at large; and though, when found to be thus intruding, they may be driven off or removed, yet it is to be done with no force or injury, and to avoid their injury, ordinary care must be observed; and that for injury done by such animals on the road the company has no remedy;<sup>1</sup> that if live stock be injured on a railroad by the negligence of the company, the company is liable therefor, unless the owner of the stock is guilty of contributory negligence in reference to the cause of the injury;<sup>2</sup> that such negligence of the owner of the animals must be immediate and proximate, to prevent a recovery;<sup>3</sup> and that allowing such animals to go at large in the vicinity of an uninclosed railroad, if negligence, is remote negligence, and does not prevent a recovery; and so, likewise, the omission to inclose the railroad, when not required by law to inclose it, is, if negligence, yet remotely so, in reference to such injuries of live stock; and negligence of the company, to create liability, must be negligence at the time of the occurrence.<sup>4</sup> But by an act of the legislature subsequently passed, March 25, 1859, railroad companies in that state are required to fence and make crossings and cattle guards within two years after their roads are in running order, and on failure so to do, are rendered liable for all damages which may result to passengers or live stock by reason of such fences, crossings and cattle guards not being constructed.<sup>5</sup> And so by the act of April 13, 1865, the running at large of live stock is prohibited, and the owners rendered liable

<sup>1</sup> *Kerwhacker v. The Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio St. 172.

<sup>2</sup> *Kerwhacker v. The Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio St. 172; *Cleveland, Columbus & Cin. R. R. Co. v. Elliott*, 4 Ohio St. 474, 475. And see *Jeffersonville, Madison & Ind. R. R. Co. v. Foster*, 63 Ind. 342; *ante*, p. 1381.

<sup>3</sup> *Kerwhacker v. The Cleveland, Columbus & Cincinnati R. R. Co.*, 3 Ohio St. 172; *Cleveland, Columbus & Cin. R.*

*R. Co. v. Elliott*, 4 Ohio St. 474, 475.

<sup>4</sup> *Kerwhacker v. C., C. & C. R. R. Co., C., H. & D. R. R. Co. v. Water-son, C., C. & C. R. R. Co. v. Elliott, supra*; *Cent. Ohio R. R. Co. v. Lawrence*, 13 Ohio St. 66; *Cincinnati & Zanesville R. R. Co. v. Smith*, 22 *Id.* 227; *Marietta & Cin. R. R. Co. v. Stephenson*, 24 *Id.* 48; *Cranston v. Cin., H. & D. R. R. Co.*, 1 *Handy (Cin.)*, 193.

<sup>5</sup> *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Methven*, 21 Ohio St. 536.

for all damages committed by such stock, except for injuries or damage to any railroad.<sup>1</sup>

In actions for injuries to live stock resulting from the failure of railroad companies to so fence their roads, it is a good defense that the plaintiff contributed to bring about the injury, either by a violation of the statute on his part, or by some act of common law negligence. The parties being *in pari delictu*, there can be no recovery. It matters not that plaintiff's negligence is remote, in allowing his cattle to run at large, if the only negligence alleged against defendant is a failure to fence the road; for that also is remote.<sup>2</sup>

But although railroad companies are under no obligation to fence their roads at certain places, as, for instance, the crossings of highways, at depots, and in corporate towns and cities, yet it is nevertheless their duty, if live stock come onto their roads at such places, to avoid injuring the same, if practicable, and if it can be done without endangering their trains, or the lives of those thereon, or property with which the trains are freighted.<sup>3</sup> In default of duty in this respect, railroad companies render themselves liable for injuries caused by such default,<sup>4</sup> provided the injured party, by his own conduct, be in condition to recover for loss of his property.

It is culpable negligence to run down and injure domestic animals found upon a railroad, without an effort to slacken speed and save them, if practicable, without endangering the train, although such animals be trespassing on the rights of the company.<sup>5</sup> In all the relations of life, our rights are to be exercised,

<sup>1</sup> Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Methven, 21 Ohio St. 586.

<sup>2</sup> Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Methven, 21 Ohio St. 586, 591, 592. See Pitzner v. Shinnick, 39 Wis. 129; Atchison, Topeka & Santa Fe R. R. Co. v. Hegwir, 21 Kans. 622; Denver & Rio Grande R. R. Co. v. Olsen, 4 Col. 239.

<sup>3</sup> Ill. Cent. R. R. Co. v. Wren, 43 Ill. 77; Chi. & N. W. Ry. Co. v. Barrie, 55 Ill. 226; Toledo, Peoria & Warsaw Ry. Co. v. Bray, 57 Ill. 514,

10 Am. Ry. Rep. 441; Rockford, Rock Isl'd & St. Louis R. R. Co. v. Lewis, 58 Ill. 49; Toledo, Peoria & Warsaw Ry. Co. v. Ingraham, 58 Ill. 120; Chi. & Alton R. R. Co. v. Kellam, 92 Ill. 245. And see Pryor v. St. Louis, Kansas City & Northern Ry. Co., 69 Mo. 215.

<sup>4</sup> Ill. Cent. R. R. Co. v. Wren, 43 Ill. 77; T., P. & W. Ry. Co. v. Bray, *supra*; Toledo, Peoria & Warsaw Ry. Co. v. Ingraham, 58 Ill. 120.

<sup>5</sup> Ill. Cent. R. R. Co. v. Middlesworth, 46 Ill. 494.

when practicable so to do, with as little injury as may be to others.<sup>1</sup> In the case here cited from 46 Ill. 494, the supreme court of that state overrule the doctrine announced in the cases of *Cent. Military Tract R. R. Co. v. Rockafellow*, 17 Ill. 541, *Great Western R. R. Co. v. Thompson*, 17 Ill. 131, *Ill. Cent. R. R. Co. v. Reedy*, 17 Ill. 580, and *Chi. & Miss. R. R. Co. v. Patchin*, 16 Ill. 198, to the effect that a railroad company is not liable for want of care in running its trains, to the injury of live stock found running at large upon the track of its road; and the great principle is asserted that we are to so use our own property, if practicable, as not unnecessarily to injure that of others. Hence it is no longer the law in Illinois, as asserted in these prior decisions, that railroad companies owe no diligence or care to owners of live stock found intruding on their roads, to avoid injury, if practicable. They are bound, in such cases, to a reasonable and ordinary care to avoid injury to the animals, both in consideration of what is due as a relative duty to the owners of the animals, as also in reference to the safety of passengers upon the trains, whose lives may be endangered by running over them.

It is not negligence to omit to sound the whistle when cattle are seen feeding near or lying down near the track, and ahead of the train; neither is it negligence to omit to go slow, or not stop the train, under such circumstances; and if an animal, under this state of things, suddenly springs upon the track, so near to, and ahead of, the engine that it would be fruitless to attempt to save it by stopping, and the animal is killed, the company is not liable to a recovery therefor.<sup>2</sup>

And though in some counties of the state cattle be prohibited from going at large, this does not in such county discharge the obligation of railroad companies to fence their roads; hence they are liable if cattle escape their inclosure, go upon a railroad where not fenced, and are there killed.<sup>3</sup>

And so in South Carolina, cattle are free commoners; they

<sup>1</sup> *Great Western R. R. Co. v. Hawthorn*, 39 Ill. 346; *Ill. Cent. R. R. Co. v. Middlesworth*, 46 Ill. 499.

<sup>2</sup> *Ill. Cent. R. R. Co. v. Wren*, 43 Ill. 77; *Chi., Bur. & Quincy R. R. Co. v. Bradfield*, 63 Ill. 220; *Louisville &*

*Nashville R. R. Co. v. Wainscott*, 3 Bush, 149. But see *South & N. Ala. R. R. Co. v. Jones*, 56 Ala. 509.

<sup>3</sup> *Ohio & Miss. Ry. Co. v. Jones*, 63 Ill. 472.



are fenced out, and not in. It is therefore no trespass for them, or other live animals, to enter upon unfenced railroad tracks, or other uninclosed grounds.<sup>1</sup> If live animals be killed or injured in said state upon a railroad, through negligence or want of ordinary care, the company is liable in damages therefor,<sup>2</sup> unless there be contributory negligence, proximate to the cause of the injury, on the part of the owner; and suffering the animals to go at large in the vicinity of the unfenced road does not amount to such.<sup>3</sup> Proof of killing raises the presumption of negligence on the part of the company.<sup>4</sup> The owner of live stock in said state who suffers the same to run out in the neighborhood of an unfenced railroad, takes his chances of injuries arising from mere accident; but not so as to those occurring from negligence.<sup>5</sup>

In North Carolina it is said that although the railroad company is bound to provide sufficient brakes upon a train to stop it within a reasonable time and distance, and a failure to do so is negligence,<sup>6</sup> yet if one wantonly or carelessly drives stock upon the track of a railroad, he is guilty of contributory negligence, and can not recover for their injury.<sup>7</sup>

The common law rule prevails in Minnesota in relation to live stock, by which every person is bound to keep his animals upon his own land, except at such portions of the year, and at

<sup>1</sup> *Murray v. The South Car. R. R. Co.*, 10 Rich. Law R. 227; *Danner v. South Car. R. R. Co.*, 4 Rich. 329.

<sup>2</sup> *North Eastern R. R. Co. v. Sineath*, 8 Rich. 185; *Murray v. The South Car. R. R. Co.*, 10 Rich. Law, 227; *Brothers v. So. Car. R. R. Co.*, 5 S. Car. (N. S.), 55; *Rowe v. Greenville & Columbia R. R. Co.*, 7 *Id.* 167.

<sup>3</sup> *Murray v. The South Car. R. R. Co.*, 10 Rich. Law, 227.

<sup>4</sup> *Danner v. The South Car. R. R. Co.*, 4 Rich. L. 329; *Wilson v. Wilmington & Manchester R. R. Co.*, 10 *Id.* 52; *Murray v. S. Car. R. R. Co.*, *supra*; *Roof v. Charlotte, C. & A. R. R. Co.*, 4 So. Car. (N. S.), 61; *Woolfolk v. Macon & Aug. R. R. Co.*, 56 Ga. 457; *White v. Concord R. R. Co.*, 30 N. H. 188; *Smith v. Eastern R. R. Co.*, 35 N. H. 356. *Contra*: *Peoria,*

*Pekin & Jacksonville R. R. Co. v. Barton*, 80 Ill. 72; *Chi., Burlington & Quincy R. R. Co. v. Farrelly*, 3 Bradw. (Ill.), 60; *Cin., Hamilton & Ind. R. R. Co. v. Bartlett*, 58 Ind. 572; *Indianapolis, P. & C. Ry. Co. v. Caudle*, 60 Ind. 112; *Schneir v. Chi., R. I. & P. R. R. Co.*, 40 Ia. 337; *Grand Rapids & Ind. R. R. Co. v. Judson*, 34 Mich. 506. But this rule does not apply to the killing of a dog: *Wilson v. The Wilmington & Manchester R. R. Co.*, 10 Rich. Law, 52.

<sup>5</sup> *Murray v. The South Car. R. R. Co.*, 10 Rich. Law, 227; *Danner v. The South Car. R. R. Co.*, 4 Rich. Law, 329.

<sup>6</sup> *Forbes v. Atlantic & N. Car. R. R. Co.*, 76 N. Car. 454, 14 Am. Ry. Rep. 313.

<sup>7</sup> *Ibid.*

such places, as is otherwise provided by statute, or by the action of towns under the statute;<sup>1</sup> therefore, live stock found at large and on a railroad at a season of the year, or in a town, when or where the going thus at large is not allowable, are trespassers, and if injured on the road, unless the injury be from carelessness of the company, it is the owner's fault, and he can not recover therefor.<sup>2</sup>

The earliest principles laid down in the courts of Kentucky in reference to fencing railroad ground and adjoining grounds, and to the killing and injuring of live stock upon railroads, is that by the conveyance of the right of way to a railroad company, the land holder neither binds himself to fence in his adjacent grounds, nor to cease the use thereof as pastures for his animals; but that in the using the same for pasturage, thus unfenced as against the railroad, he does so at his own risk of injury to them, so far as injury may occur without being the result of negligence on the part of the company.<sup>3</sup> And so, in the same case, it is held that while no obligation rested on the railroad company to fence its road,<sup>4</sup> yet it was under obligation to avoid injury to animals found thereon, as far as practicable, having due regard to the safety of trains and passengers; and that for accidental killing of or injury to live stock in running the trains, there was no liability.<sup>5</sup>

At common law, a railroad company is not liable for live animals killed or injured on its road, unless the same be from its

<sup>1</sup> *Locke v. 1st Div. of St. Paul & Pacific R. R. Co.*, 15 Minn. 350.

<sup>2</sup> *Locke v. 1st Division St. Paul & Pacific R. R. Co.*, 15 Minn. 350; *Witherell v. Mil. & St. Paul Ry. Co.*, 24 Minn. 410. And see *Fitch v. Buffalo, N. Y. & P. R. R. Co.*, 13 Hun, 668; *Darling v. Boston & Albany R. R. Co.*, 121 Mass. 118. When allowed by law to be at large at certain times, they may run in the streets unattended, and the owner is not guilty of negligence in allowing it. In such case, the railroad company must use reasonable diligence to avoid injuring such stock, as by running at a lawful speed

and ringing the bell: *Fritz v. First Div. St. Paul & Pacific R. R. Co.*, 22 Minn. 404, 19 Am. Ry. Rep. 404.

<sup>3</sup> *Louisville & Frankfort R. R. Co. v. Milton*, 14 B. Mon. 61.

<sup>4</sup> Nor to make walls in the sides of deep cuts along its right of way, to prevent the falling in of the adjoining land holder's ground: *Hortsman v. The Covington & Lexington R. R. Co.*, 18 B. Mon. 218. And see *Boothby v. Androscoggin & Kennebec R. R. Co.*, 51 Me. 318.

<sup>5</sup> *Louisville & Frankfort R. R. Co. v. Milton*, 14 B. Mon. 61.

negligence.<sup>1</sup> Actions for such injuries are limited, in Kentucky, by statute, to six months.<sup>2</sup>

In Louisiana, there being no law requiring the fencing of railroads, the company is not bound to fence.<sup>3</sup> And so, there being no law requiring owners of live stock to keep them up, such stock have a right to go at large.<sup>4</sup> If, being so at large, they go upon a railroad, and get accidentally maimed or killed, the company are not liable therefor.<sup>5</sup> And if, by so going upon an unfenced railroad, the stock cause damage thereto, or by reason thereof, they having strayed thereon, and not having been placed there by the owner, no action lies against the owner for such injury.<sup>6</sup>

If the claim is predicated upon the alleged negligence of the company, in an action for injury to live stock, then the plaintiff is as much bound to prove the negligence as the injury; it is not sufficient to prove the injury alone.<sup>7</sup> But if, when the animals are found ahead of the train, upon the railroad track, the usual method of frightening them off, by blowing the whistle, be not resorted to, and the speed of the train be not diminished, but increased, this will amount to such evidence of negligence on the part of the company as will put the burden of proof on it to show the contrary thereof.<sup>8</sup>

And so as to owners thereof generally, no liability for injury

<sup>1</sup> Louisville & Frankfort R. R. Co. v. Ballard, 2 Met. (Ky.), 183.

<sup>2</sup> O'Bannon v. Louisville, Cincinnati & Lexington R. R. Co., 8 Bush (Ky.), 348.

<sup>3</sup> Jenkins v. The N. Orleans, Opelousas & Great Western R. R. Co., 15 La. An. 118; Knight v. N. Orleans, Opelousas & Great Western R. R. Co., 15 La. An. 105.

<sup>4</sup> Jenkins v. The N. Orleans, Opelousas & Great Western R. R. Co., 15 La. An. 118; Knight v. The N. Orleans, Opelousas & Great Western R. R. Co., 15 La. An. 105.

<sup>5</sup> Jenkins v. The N. Orleans, Opelousas & Great Western R. R. Co., *supra*; Knight v. N. Orleans, Opelousas & Great Western R. R. Co., *su-*

*pra*.

<sup>6</sup> Jenkins v. The N. Orleans, Opelousas & Great Western R. R. Co., *supra*; Knight v. N. Orleans, Opelousas & Great Western R. R. Co., 15 La. An. 105.

<sup>7</sup> Knight v. The New Orleans, Opelousas & Great Western R. R. Co., 15 La. An. 105.

<sup>8</sup> Lapine v. The N. Orleans, Opelousas & Great Western R. R. Co., 20 La. An. 158; East Tenn., Va. & Ga. R. R. Co. v. Scales, 2 Lea (Tenn.), 688. But if the failure to blow the whistle did not contribute to the injury, it is not material: Holman v. C., R. I. & P. R. R. Co., 62 Mo. 562; Hawker v. Balt. & Ohio R. R. Co., 15 W. Va. 628.

to live stock by a railroad company, when such stock has strayed upon the track, exists in Nevada, except as at common law. There must be negligence, willfulness, or the omission of some known duty; and the business being lawful, the mere fact of injury is not presumption of either as against the company, when the injury occurs upon the track or premises of the company.<sup>1</sup> The *onus probandi*, as to such acts or state of facts as cause liability, is on the plaintiff in such cases.<sup>2</sup>

But under the statute of that state, if the injured stock be the property of the adjoining land owner, and have come onto the railroad at a place from such owner's premises where the company is bound by law to fence, and has omitted to do so, then the company is liable, without proof of negligence or other dereliction of duty on its part than omitting to fence.<sup>3</sup> Contributory negligence, in that state, must, to relieve from liability, proximately contribute to the cause of the injury.<sup>4</sup>

In New Jersey the ruling is purely as at common law, that stock are not free commoners, and every one must keep his live stock off the grounds of others; that escaping from their owner, and straying onto a railroad, they are there trespassers, and, therefore, if injured or killed by the mere negligence of the company's servants, no recovery can be had, as the owner is himself chargeable with negligence in respect to their being at large and on the road; that there is in such case mutual negligence, and that therefore there can be no recovery.<sup>5</sup>

And so the ruling in Pennsylvania is, that though cattle in that state are so far free commoners, when going at large on uninclosed and unoccupied lands, that thereby they are not trespassers, yet it is so only by reason of the unappreciable injury they commit under such circumstances;<sup>6</sup> and therefore where such intrusion

<sup>1</sup> *Walsh v. Virginia & Truckee R. Co.*, 8 Nev. 110.

<sup>2</sup> *Walsh v. Virginia & Truckee R. Co.*, 8 Nev. 110; *Peoria, Pekin & Jacksonville R. R. Co. v. Barton*, 80 Ill. 72; *Chi., Burlington & Quincy R. Co. v. Farrelly*, 3 Bradw. (Ill.), 60; *Cincinnati, Ham. & Ind. R. R. Co. v. Bartlett*, 58 Ind. 572; *Indianapolis, P. & C. Ry. Co. v. Caudle*, 60 Ind. 112; *Schneir v. Chi., R. I. & P. Ry.*

*Co.*, 40 Ia. 337; *Grand Rapids & Ind. R. R. Co. v. Judson*, 34 Mich. 506.

<sup>3</sup> *Walsh v. Virginia & Truckee R. R. Co.*, 8 Nev. 110.

<sup>4</sup> *Longabaugh v. Virginia City & Truckee R. R. Co.*, 9 Nev. 271.

<sup>5</sup> *Price v. The New Jersey R. R. & Trans. Co.*, 2 Vroom (N. J.), 229; *Same v. Same*, 3 Vroom (N. J.), 19; *Vandegrift v. Rediker*, 2 Zab. 185.

<sup>6</sup> *N. Y. & Erie R. R. Co. v. Skinner*,

will occasion substantial damage, the English or common law rule applies, and they are trespassers.<sup>1</sup> Hence it is held in that state that cattle upon a railroad are trespassers, and that for any substantial injury done or caused by them while there, the owner is liable to the railroad company, although the road be not fenced as required by the statute; and that therefore, if they be injured by the company or its servants, by accident, or without wantonness or gross negligence, while thus being where they ought not to be, the owner can not recover for the injury;<sup>2</sup> and that the neglect to fence, as required by statute, is in such cases but the remote cause of the injury, and will not in itself render the company liable.<sup>3</sup>

The rule is the same, in an action in tort, if the company, in addition to the statutory liability to fence, place itself under a contract obligation to do so; as where the company purchase the right of way for a sum in money, and for an undertaking on its part to fence the road where it passes through the lands of the grantor. Such purchase entitles the company to a clear track, and it is the duty of the land holder to keep his cattle off the same; and this duty is none the less obligatory from the fact that the company has bound itself to fence. The breach of contract on the part of the company will subject it to an action for such damages as result directly therefrom, but will not absolve the land owner from the observance of ordinary care on his part to prevent his cattle trespassing on the road. The wrong of the company in not fencing will not justify the wrong of the land holder done to the company and the public by allowing his cattle to obstruct the road, in the absence of a statute to that effect.<sup>4</sup>

19 Penn. St. 298; *North Pennsylvania R. R. Co. v. Rehman*, 49 Penn. St. (13 Wright), 101; *Drake v. Phila. & Erie R. R. Co.*, 51 Penn. St. 240, 242.

<sup>1</sup> *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *North Pennsylvania R. R. Co. v. Rehman*, 49 Penn. St. (13 Wright), 101; *Drake v. Phila. & Erie R. R. Co.*, 51 Penn. St. 240, 242; *Penn. R. R. Co. v. Riblet*, 66 Penn. St. 164.

<sup>2</sup> *Knight v. Abert*, 6 Penn. St. (6 Barr), 472; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *North*

*Penn. R. R. Co. v. Rehman*, 49 Penn. St. (13 Wright), 103; *Drake v. Phila. & Erie R. R. Co.*, 51 Penn. St. 240, 242.

<sup>3</sup> *Drake v. Phila. & Erie R. R. Co.*, 51 Penn. St. 240, 242; *Knight v. Abert*, 6 Penn. St. (6 Barr), 472. Nor even for negligence, if the owner himself, by negligence, contributes to bringing the injury about—as by voluntarily suffering stock to go at large: *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. 101.

<sup>4</sup> *Drake v. Phila. & Erie R. R. Co.*,

A railroad company is a purchaser, in consideration not only of the price paid therefor, but of public accommodation and convenience, of the exclusive possession of the ground or right of way paid for to the proprietor, and of a license to use the greatest attainable rate of speed in running its trains thereon, with which neither the person nor property of another may interfere.<sup>1</sup>

A statutory or charter obligation to fence, when imposed thereby upon a railroad company, is a duty owed by the company only to the public, in consideration of the privileges granted,<sup>2</sup> unless otherwise provided by law.

The rule in *Massachusetts*, in relation to injuries to live animals upon railroads, is that when such animals are there as trespassers, the company is only liable if the injury be wantonly inflicted, and is not liable for mere negligence; that the law requiring railroad companies to fence is only as in favor of adjoining owners, and, therefore, if the animals of other persons come upon the road, they are considered as trespassing, and no care is required to avoid their injury.<sup>3</sup> In the case here cited from 115 Mass., GRAY, C. J., lays down the rule as follows: "If the horse had been rightfully upon the defendant's land, it would have been their duty to exercise reasonable care to avoid injuring the horse. But it being admitted by the plaintiff that his horse was trespassing upon the railroad, they did not owe him that duty, and were not liable to him for anything short of a reckless and wanton misconduct of those employed in the management of their train."<sup>4</sup> Citing *Tonawanda R. R. Co. v. Munger*, 5 Denio, 255; *Vandegrift v. Rediker*, 2 Zab. 185; *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. 298; *Tower v. Provi-*

51 Penn. St. 240, 242, 243; *Hurd v. Rutland & Burlington R. R. Co.*, 25 Vt. 116.

<sup>1</sup> *N. Y. & Erie R. R. Co. v. Skinner*, 19 Penn. St. (7 Harris), 298; *North Penn. R. R. Co. v. Rehman*, 49 Penn. St. (13 Wright), 101; *Drake v. Phila. & Erie Railroad Co.*, 51 Penn. St. 240.

<sup>2</sup> *Drake v. Phila. & Erie R. R. Co.*, 51 Penn. St. 240, 241.

<sup>3</sup> *Eames v. Salem & L. R. R. Co.*, 98 Mass. 560; *Maynard v. Boston &*

*Maine R. R. Co.*, 115 Mass. 458; *McDonnell v. Pittsfield & North Adams R. R. Co.*, 115 Mass. 564; *Darling v. Boston & Albany R. R. Co.*, 121 Mass. 118.

<sup>4</sup> *Maynard v. Boston & Maine R. R. Co.*, 115 Mass. 458, 460. Where cattle are injured at a railroad crossing while being driven along the highway, it is for the jury to say whether they were driven with due care: *Towne v. Nashua & L. R. R. Co.*, 124 Mass. 101.

dence & Worcester R. R. Co., 2 R. I. 404; Cincinnati, Hamilton & Dayton R. R. Co. v. Waterson, 4 Ohio St. 424; Louisville & Frankfort R. R. Co. v. Ballard, 2 Met. (Ky.), 177.

In such actions, it is sufficient if the averment be that the injury was sustained upon a road owned and occupied by the defendant, from cars managed by its servants, so far as the identity of the road is concerned<sup>1</sup>—setting out properly the cause of action.

In Tennessee, certain precautions are required by statute in order to prevent accidents or injuries to individuals or stock.<sup>2</sup> Under this statute, it is held that if the company prove that all of such precautions were observed, then the accident was unavoidable, and the company is not liable; in the absence of such proof, they are responsible for all damages occasioned by the accident, whether resulting from their negligence or not.<sup>3</sup> In addition to the specific precautions required, they must show that the general requirement of the statute, that "every possible means was employed to stop the train and prevent the accident," was complied with.<sup>4</sup> In resorting to such additional means, those need not be used which will probably endanger the lives or property of passengers; but this will be no excuse for not observing the specific requirements.<sup>5</sup> It is not enough, under the general requirement mentioned, to set one brake for the purpose of stopping the train; all of the brakes should be set.<sup>6</sup> In such case, contributory negligence in allowing stock to run at large (the running of stock on commons being lawful), can not be relied upon by the company, either in bar of the action or in mitigation of damages.<sup>7</sup>

**2. Under the statute, as for want of a fence.**—It is well settled by authority that the legislatures of the several states may pass laws, as matter of police, requiring railroad corporations to fence

<sup>1</sup> Austin v. The New York & Erie R. R. Co., 1 Dutch. 381, 383. Such an averment is necessary, even in the court of a justice of the peace: Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Troxell, 57 Ind. 246, 18 Am. Ry. Rep. 347.

<sup>2</sup> Memphis & Charleston R. R. Co. v. Smith, 9 Heisk. 860, 20 Am. Ry. Rep. 60.

<sup>3</sup> Ibid. And see Louisville & Nash-

ville R. R. Co. v. Brown, 13 Bush, 475; Kentucky Cent. R. R. Co. v. Lebus, 14 Bush, 518; Atlantic & Gulf R. Co. v. Griffin, 61 Ga. 11; Mobile & Ohio R. R. Co. v. Williams, 53 Ala. 595; Little Rock & Fort Smith R. R. Co. v. Payne, 33 Ark. 816.

<sup>4</sup> M. & C. R. R. Co. v. Smith, *supra*.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

their roads at such places as fences are practicable, and may impose reasonable penalties, and liability to respond for injuries arising from omission so to do.<sup>1</sup> And such requirements may be applied to railroad corporations already existing, as well as to such as are incorporated after the enactment of the law, whether there be a reservation in the charter, or not, of such power in the state.<sup>2</sup>

The laws requiring railroad companies to fence their roads are not enacted merely to determine who shall fence and bear the burden thereof, between railroads and landed proprietors, nor merely to fix the liability of such companies for domestic animals injured upon their road by engines or trains, nor simply to protect living stock running at large from being injured by going onto these roads, but not only for each of such purposes, yet more especially for the increased safety of the lives and property of persons traveling on those roads, and for the better security of property carried thereon.<sup>3</sup>

A father can not recover damages for the injury of stock owned by his minor son.<sup>4</sup>

<sup>1</sup> Penn. R. R. Co. v. Riblet, 66 Penn. St. 164; Blair *et al.* v. Milwaukee & Prairie du Chien R. R. Co., 20 Wis. 254, 259; Gorman v. Pacif. R. R. Co., 26 Mo. 441; Trice v. The Hannibal & St. Jos. R. R. Co., 49 Mo. 438. Chap. 94 of Kansas Laws of 1874, which provides, first, that the railroad company shall be liable absolutely for the killing or wounding of stock, irrespective of negligence on their part, and then, in a subsequent section, provides that the law shall not apply to railway companies whose road is inclosed with a good and lawful fence, was held constitutional and valid in Kansas Pacific Ry. Co. v. Mower, 16 Kans. 573, 9 Am. Ry. Rep. 400. Under this statute, it is held that its object was to obviate the necessity of inquiring into the mere negligence of owners or the company. If cattle get upon the track at a place where the road can and ought to be fenced, and without wanton or willful act of

the owner are injured, the company is liable: Hopkins v. Kansas Pacific Ry. Co., 18 Kans. 462, 16 Am. Ry. Rep. 41. And see Atchison & Neb. R. R. Co. v. Harper, 19 Kans. 529, 19 Am. Ry. Rep. 42, affirming the Mower case, *supra*. And see, also, Central Branch R. R. Co. v. Lea, 20 Kans. 353, limiting the doctrine announced in the Hopkins case, *supra*. The railroad company is entitled to the best evidence of the value of the stock killed: A. & N. R. R. Co. v. Harper, *supra*.

<sup>2</sup> Gorman v. Pacific R. R. Co., 26 Mo. 441; Wilder v. Maine Central R. R. Co., 65 Me. 332, 9 Am. Ry. Rep. 289.

<sup>3</sup> Blair and another v. Mil. & Prairie du Chien R. R. Co., 20 Wis. 254, 258; Corwin v. The N. York & Erie R. R. Co., 13 N. Y. 45.

<sup>4</sup> Morris v. St. Louis, Kansas City & Northern Ry. Co., 58 Mo. 78, 9 Am. Ry. Rep. 96.



To omit to fence is negligence in Wisconsin, and a person injured by reason of such omission, may, in the courts of said state, recover for the injury by suit against the company, without proof of other negligence, if the plaintiff himself be not guilty of contributing to the cause of the injury by his own negligence.<sup>1</sup> Such laws requiring fencing of railroads are police regulations, and are rightful subjects of legislation, irrespective of constitutional provisions expressly conferring power to pass the same.<sup>2</sup>

Although the law may impose upon a railroad company the duty of fencing its road, and of keeping up the fence, yet there are corresponding duties resting on the adjoining land holders and owners of live stock. They may not voluntarily suffer their stock to go upon the road through known deficiency of fences, and then recover for the damages if the animals be injured;<sup>3</sup>

<sup>1</sup> Blair and another v. Mil. & Prairie du Chien R. R. Co., 20 Wis. 254, 258, 259; Same v. Same, 20 Wis. 262. But see Lawrence v. Milwaukee, Lake Shore & Western Ry. Co., 42 Wis. 322, 15 Am. Ry. Rep. 366. And so in Minnesota: Whittier v. Chicago, Milwaukee & St. Paul Ry. Co., 24 Minn. 394; S. C. 2 N. W. Repr. 20, 15 Am. Ry. Rep. 450. See also Curry v. Chicago & N. W. Ry. Co., 43 Wis. 665, 16 Am. Ry. Rep. 219; Ohio & Miss. Ry. Co. v. Clutter, 82 Ill. 123; Cary v. St. Louis, K. C. & N. Ry. Co., 60 Mo. 209; Small v. C., R. I. & P. R. R. Co., 50 Ia. 338. The opening, or leaving open, a gate, with the assent or acquiescence of the company, will constitute a failure to fence within the statute: Spinner v. New York Central & Hudson River R. R. Co., 67 N. Y. 153, 15 Am. Ry. Rep. 126. And evidence that the company had been accustomed to use such gate for their own convenience, and had habitually left it open, and that the proprietor of the land had not used it for some weeks previous to the accident, held, sufficient to justify a finding by the jury that the company

were responsible for its being open at that time: *Ibid.* But, of course, the company is not liable if the gate is left open by the owner or his servant: Koutz v. Toledo, Wabash & Western Ry. Co., 54 Ind. 515; Hook v. Worcester & N. R. R. Co., 9 Repr. 348.

<sup>2</sup> Blair and another v. Mil. & Prairie du Chien R. R. Co., 20 Wis. 254, 259.

<sup>3</sup> Chicago, B. & Q. R. R. Co. v. Seirer, 60 Ill. 295. And so held in Ohio under their statute (Act of Mar. 25, 1859—1 S. & C. 331), which provides that where the fence is the boundary of an inclosed field, both must maintain the fence: Sandusky & Cleveland R. R. Co. v. Sloan, 27 Ohio St. 341, 11 Am. Ry. Rep. 264; Dayton & Mich. R. R. Co. v. Miami Co. Infy., 32 Ib. 566. And see Whittier v. C., M. & St. P. Ry. Co., *supra*. But see Wilder v. Maine Central R. R. Co., 65 Me. 332, 9 Am. Ry. Rep. 289; Downing v. Chicago, Rock Island & Pacific R. R. Co., 43 Ia. 96, 14 Am. Ry. Rep. 406; Ohio & Miss. R. R. Co. v. Fowler, 85 Ill. 21. Where the plaintiff lived three fourths of a mile from the track, it was held the question of his contributory negligence in turning his

thus where live stock broke the fence of a railroad and entered thereon, and the owner, on removing the same, instead of notifying the company, repaired the fence himself, but in so sorry a manner that the stock entered again at the same place and were injured, it was held that the owner could not recover.<sup>1</sup>

In actions for damages against a railroad company for injury to live stock, when the right of recovery is predicated upon omission to fence, then the burden of proof as to fencing is upon the plaintiff; he must aver and prove the duty and the omission to fence.<sup>2</sup> But when the absence of a fence is shown, and the injury is proven, then if defendant will avoid liability by showing the occurrence to have originated at a place where fencing was not required, or was not allowable, as at a public crossing, within a city, town or village, or at a depot, or other public place of business, then the burden of proof is on the defendant to prove these facts;<sup>3</sup> and if not absolutely necessary, yet it were the better practice to plead them.

When plaintiff counts on a supposed case of statutory liability for not fencing, no recovery can be had unless the duty to fence is shown to rest upon the company.<sup>4</sup> If the facts show that the

stock loose thus near an unfenced road, was for the jury: *Curry v. Chicago & Northwestern Ry. Co.*, 3 N. W. Repr., 43 Wis. 665, 16 Am. Ry. Rep. 219.

<sup>1</sup> *C., B. & Q. R. R. Co. v. Seirer*, 60 Ill. 295.

<sup>2</sup> *Baxter v. Boston & Worcester R. R. Co.*, 102 Mass. 383; *Peoria, Pekin & Jacksonville R. R. Co. v. Barton*, 80 Ill. 72; *Chicago, Burlington & Quincy R. R. Co. v. Farrelly*, 3 Bradw. (Ill.), 60; *Cincinnati, H. & I. R. R. Co. v. Bartlett*, 58 Ind. 572; *Indianapolis, P. & C. Ry. Co. v. Caudle*, 60 Ind. 112; *Schneir v. C., R. I. & P. Ry. Co.*, 40 Ia. 337; *Grand Rapids & I. R. R. Co. v. Judson*, 34 Mich. 506; *Woolfolk v. Macon & Aug. R. R. Co.*, 56 Ga. 457. And the same is true as to a failure to ring the bell, where that is relied on as evidence of negligence: *Meyer*

*v. Atlantic & Pacific R. R. Co.*, 64 Mo. 542, 17 Am. Ry. Rep. 249.

<sup>3</sup> *Baxter v. Boston & Worcester R. R. Co.*, 102 Mass. 383; *Jeffersonville, Madison & Indianapolis R. R. Co. v. O'Connor*, 37 Ind. 95, 5 Am. Ry. Rep. 566; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595, 13 Am. Ry. Rep. 153. The burden is the same as to contributory negligence of the plaintiff: *Rogers v. Newburyport R. R. Co.*, 1 Allen, 16; *Cairo & St. Louis R. R. Co. v. Woosley*, 85 Ill. 370. Otherwise, however, if the company is not in default as to fences: *Jeffersonville, Madison & Ind. R. R. Co. v. Huber*, 42 Ind. 173; *Indianapolis, P. & C. Ry. Co. v. Caudle*, 60 Ind. 112; *Waldron v. Portland, Saco & P. R. R. Co.*, 35 Me. 422.

<sup>4</sup> *Rock Island & Alton R. R. Co. v. Lynch*, 23 Ill. 645; *Galena & Chi.*

owner of the adjoining land, to whom the injury occurs, assumed to do the fencing himself, and had not, or that the grantor of the owner whose property is injured made such undertaking, and failed to perform, then the land itself is chargeable with the fencing, and the same charge rests upon such subsequent owner, and he can not recover for injury there inflicted on his stock, as for want of a fence.<sup>1</sup> Therefore, when, by the assessment of condemnation money for the right of way, the cost of fencing and keeping up the fence is included in the amount assessed against the company, then inferentially, and as a legal result, the duty of fencing is removed from the company, and imposed upon the land holder, at that particular locality, and is one that passes to and rests upon the grantee of such land holder; and neither the one or other of such land holders can recover for injuries to live stock at the *locus in quo*, alleged to have occurred for want of a fence.<sup>2</sup>

Union R. R. Co. v. Crawford, 25 Ill. 529; Chi. & Alton R. R. Co. v. Utley, 38 Ill. 410; Toledo, Peoria & Warsaw Ry. Co. v. Wickery, 44 Ill. 76; Chi. & N. W. Ry. Co. v. Barrie, 55 Ill. 226; Rockford, Rock Isld. & St. Louis R. R. Co. v. Lynch *et al.*, 67 Ill. 149; Small v. Chi., R. I. & P. Ry. Co., 50 Ia. 341.

<sup>1</sup>Rock Island & Alton R. R. Co. v. Lynch, 23 Ill. 645; Rockford, Rock Isld. & St. Louis R. R. Co. v. Lynch, 67 Ill. 149. In Ohio it is held that, under Sec. 2 of the Act of 1859 (56 Ohio L. 62), where the adjoining owner constructs a sufficient fence, inclosing his own land and also the railroad, the fact that compensation was not paid for the right of way will not prevent the company from joining its fences to such fence; and when so inclosed, no additional fence need be constructed: Haxton v. Pittsburg, Cincinnati & St. Louis Ry. Co., 26 Ohio St. 214, 11 Am. Ry. Rep. 257.

<sup>2</sup>Rockford, Rock Isld. & St. Louis R. R. Co. v. Lynch *et al.*, 67 Ill. 149. But see Baltimore, P. & C. Ry. Co. v. John-

son, 59 Ind. 188. A release of a right of way, and of all damages, etc., sustained by reason of location and construction of work, "or the repairing thereof when finally established or completed," will not operate as a release of damages for the injury of cattle: Cleveland, Columbus, Cincinnati & Indianapolis Ry. Co. v. Crossley, 36 Ind. 370, 5 Am. Ry. Rep. 552; and a waiver of the company's duty to fence will not be inferred from a simple conveyance of the right of way: Smith v. N. Y. & O. M. R. R. Co., 63 N. Y. 58. In California it is held that Sec. 30 of the Railroad Act of May 20th, 1861, providing that in assessing damages for right of way the commissioners shall include the cost of fences, unless the company offer to construct the same, and providing that if the land be uninclosed the company shall not be required to construct fences until the adjoining owner shall have constructed fences abutting on the road, means that the company shall not be compelled to perform such offer to fence until the owner fences as required. It does not exempt the com-

Whether the negligence of a railroad company in omitting to fence its road, as it was by law required, was the cause of injury to an infant of years too tender to be charged with a want of care, and whether in such case there was negligence of the parents of the child, or of those in whose charge the child was, which contributed to bringing upon it an injury, are proper subjects and questions for the decision of the jury, in the trial of an action by such child for a personal injury, by its guardian, wherein these questions are involved.<sup>1</sup>

In Wisconsin, prior to the act of 1860, requiring railroad companies to fence their roads, assessments of damages for right of way were made upon the principle that the land holders were to do the fencing, and allowance was made therefor; hence, where such assessments were made and paid prior to the passage of said act, and injuries have been inflicted on animals of the adjoining land holder since, and as for want of a fence, no recovery against the company can be had. In that respect, the rights and duties of the parties are not changed by the act of 1860, however it may be as to third persons or the public.<sup>2</sup>

By the statute in Maine, railroad companies being only required to fence their roads where they pass through inclosed or cultivated grounds, are not liable, under the statute, for killing or injuring live stock, as merely for want of a fence, when the injury occurs elsewhere than at improved or inclosed grounds—as at ordinary commons or uninclosed lands.<sup>3</sup> It is the duty of owners, in that state, to keep their live stock up; and if, running at large, they go upon a railroad at uninclosed commons, then, although they may not be negligently or wantonly injured, yet the company is not liable, except for acts of wantonness or negligence; and if for the latter, then only when plaintiff shows the observance of due care on his part to avoid the injury to his property.<sup>4</sup>

pany from the liability created by Sec. 40 for stock killed on unfenced portions of the road: *Fontaine v. Southern Pacific R. R. Co.*, 54 Cal. 645; *S. C.*, 1 Am. & Eng. R. R. Cas. 159.

<sup>1</sup>*Schmidt, an infant, etc., v. Mil. & St. Paul Ry. Co.*, 23 Wis. 136. See *Isabel v. Hannibal & St. Jos. R. R. Co.*, 60 Mo. 475; *Williams v. Great Western Ry. Co.*, L. R. 9 Exch. 157.

<sup>2</sup>*Johnson v. Mil. & St. Paul Ry. Co.*, 19 Wis. 137.

<sup>3</sup>*Perkins v. Eastern, & Boston & Maine R. R. Co.*, 29 Maine, 307; *Gilman v. European & N. Am. Ry. Co.*, 60 Me. 235. See *Giles v. Boston & Me. R. R. Co.*, 55 N. H. 552.

<sup>4</sup>*Perkins v. Eastern, & Boston & Maine R. R. Co.*, 29 Maine, 307.

By the latest ruling in Iowa, it is held that a railroad company which has constructed its road, and is actually owning and operating it, but at the same time suffers another company to use and run its trains upon the same, is not liable for injuries to live stock caused by the trains of the latter upon such road; but that each corporation—that is, both the original owner and such lessee—are separately liable under the statute, each for their own acts, negligence and wrongs in that respect, and not for those of the other.<sup>1</sup> In Illinois, the rule as to liability is against both;<sup>2</sup> and so in Vermont.<sup>3</sup> But in Indiana, in an action against both companies, the allegations of the complaint were that the horse was injured upon the road of one defendant, by the cars of the other company passing over the road in charge of their own officers; and they were held insufficient, because the owner company was not alleged to have authorized the use by the other company, and the using company was not alleged to have been running the road in the name of the owner company, either as lessees, assignees, receiver, or otherwise.<sup>4</sup> And a company leasing a road will not become liable for injuries inflicted thereon before the execution of the lease.<sup>5</sup>

When the right to recover is predicated upon the violation or omission of a statutory obligation or duty, to enable plaintiff to recover, he must establish by proof all the facts which are ma-

<sup>1</sup> *Stephens v. D. & St. P. R. R. Co.*, 36 Iowa, 327; *Clary v. Ia. Midland Ry. Co.*, 37 Ia. 344.

<sup>2</sup> *Ill. Cent. R. R. Co. v. Kanouse*, 39 Ill. 272; *Toledo, Peoria & Warsaw Ry. Co. v. Rumbold*, 40 Ill. 143; *East St. Louis & C. Ry. Co. v. Gerber*, 82 Ill. 632. And see *Bean v. Atlantic & St. Lawrence R. R. Co.*, 63 Me. 293; *McGrath v. N. Y. Cent. & H. R. R. Co.*, 63 N. Y. 522.

<sup>3</sup> *Clement v. Canfield*, 28 Vt. 302; *Nelson v. Vt. & Can. R. R. Co.*, 26 Vt. 717.

<sup>4</sup> *Cincinnati & Martinsville R. R. Co. v. Paskins*, 36 Ind. 380, 5 Am. Ry. Rep. 570. And see this case affirmed in *Cincinnati & Martinsville R. R. Co.*, and *I. C. & L. R. R. Co. v. Townsend*,

39 Ind. 38, 10 Am. Ry. Rep. 406.

<sup>5</sup> *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Kain*, 35 Ind. 291, 5 Am. Ry. Rep. 574. But will after: *Downing v. Chicago, Rock Island & Pacific R. R. Co.*, 43 Ia. 96, 14 Am. Ry. Rep. 406; *Cook v. Milwaukee & St. Paul Ry. Co.*, 36 Wis. 45; *Houston & Great Northern R. R. Co. v. Meador*, 50 Tex. 77. And the lessor is also liable: *Kansas City, Fort Scott & Gulf R. R. Co. v. Ewing*, 23 Kans. 273. A corporation in possession of a road as a trustee, is a railway corporation within the Kansas statute, and as such, liable for injuries to stock: *Union Trust Co. v. Kendall*, 20 Kans. 515, 20 Am. Ry. Rep. 294. And see *Jones v. Seligman*, 16 Hun, 230.

terial to bring the case clearly within the statute;<sup>1</sup> and this, too, whether the allegations in his declaration or petition be that broad; or not. He must prove a case, even though he omit to state one in such manner as would not be the subject of demurrer.<sup>2</sup> As, for instance, in an action under the statute for injury to or killing of live stock, as for want of a fence, the plaintiff must not only prove the killing, but also such other facts as bring the case within the statute—the right to fence, and omission to fence, at the time and place where the injury occurs, and whatever else the statute embraces.<sup>3</sup>

In Indiana, the rule of the common law prevails in regard to live stock running at large, if there be no order of the board of county commissioners allowing animals to run at large.<sup>4</sup> Such was not the case, however, in the times of the early settlement of the state.<sup>5</sup> By the act of 11th of May, 1852, the rule of the common law was changed under certain circumstances, in reference to the rights of the owners of live stock and of railroad companies, and instead of the owners of live stock being required to keep their animals off of railroads at private parts thereof, the railroad companies were declared liable to pay for the same when killed or injured on their roads at places where fences are by law allow-

<sup>1</sup> *Ohio & Miss. R. R. Co. v. Brown*, 23 Ill. 94; *Galena & Chi. Union R. R. Co. v. Sumner*, 24 Ill. 631; *Ohio & Miss. R. R. Co. v. Meisenheimer*, 27 Ill. 30; *Ohio & Miss. R. R. Co. v. Jones*, 27 Ill. 41; *Ill. Cent. R. R. Co. v. Williams*, 27 Ill. 48; *Ohio & Miss. R. R. Co. v. Taylor*, 27 Ill. 207; *Great Western R. R. Co. v. Bacon*, 30 Ill. 347.

<sup>2</sup> *Ohio & Miss. R. R. Co. v. Brown*, 23 Ill. 94; *Ohio & Miss. R. R. Co. v. Meisenheimer*, 27 Ill. 30; *Ohio & Miss. R. R. Co. v. Jones*, 27 Ill. 41.

<sup>3</sup> *Ohio & Miss. R. R. Co. v. Brown*, 23 Ill. 94; *Small v. C., R. I. & P. Ry. Co.*, 50 Ia. 338.

<sup>4</sup> *Williams v. New Albany & S. R. R. Co.*, 5 Ind. 111; *The Lafayette & Indianapolis R. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & Cin. R. R. Co. v. Kinney*, 8 Ind. 402; *Same v. McClure*, 26 Ind. 370; *Michigan S. & N.*

*Indiana R. R. Co. v. Fisher*, 27 Ind. 96; *Indianapolis, C. & L. R. R. Co. v. Harter*, 38 Ind. 557.

<sup>5</sup> *Michigan S. & Northern Indiana R. R. Co. v. Fisher*, 27 Ind. 96, 97. And at common law, a complaint for killing stock should allege that the injury did not result from the negligence of the plaintiff: *Jeffersonville, Madison & Indianapolis R. R. Co. v. Lyon*, 55 Ind. 477, 16 Am. Ry. Rep. 250. But where such averment is omitted, but negligence is charged against the company, on demurrer for misjoinder of causes of action, the latter averment will be treated as surplusage, and the action is well brought under the statute: *Ibid.* The bare averment is sufficient, without showing the facts: *Louisville, New Albany & Chicago Ry. Co. v. Smith*, 58 Ind. 575, 19 Am. Ry. Rep. 18.

able, and the roads are not inclosed by a proper fence. This liability, within a certain sum, and in an action in certain courts, was absolute, and irrespective of negligence or of accidental killing.<sup>1</sup> This act of 1852 was subsequently merged in, or repealed in this respect by, the act of March the first, 1853, authorizing proceedings in such cases before justices of the peace, and declaring, in effect, that on proof of the killing and damages, and of there being no fence, the justice should give judgment for the plaintiff, without regard to whether the injury resulted from the negligence or willfulness of the defendant, or from unavoidable accident;<sup>2</sup> but only in proceedings in justices' courts, and for sums not exceeding fifty dollars. To cases commenced in the courts of record, the common law rule of liability still prevailed.<sup>3</sup> This statutory liability applied only to such places as at which it was practicable to fence, and not to crossings of highways,<sup>4</sup> approaches to mills, and other public places.<sup>5</sup> At these, the common law rule prevailed, as to negligence necessary to liability; but a mere place of deposit of wood is not such.<sup>6</sup>

<sup>1</sup> *Williams v. The New Albany & Salem R. R. Co.*, 5 Ind. 111; *Lafayette & Indianapolis R. R. Co. v. Shriner*, 6 Ind. 141; *Jeffersonville, Madison & Indianapolis R. R. Co. v. O'Connor*, 37 Ind. 95, 5 Am. Ry. Rep. 566; *Louisville, New Albany & Chicago Ry. Co. v. Cahill*, 63 Ind. 340; *Same v. Whitesell*, 68 *Id.* 297. And so in Missouri: *Nall v. St. Louis, Kansas City & Northern Ry. Co.*, 59 Mo. 112, 8 Am. Ry. Rep. 447.

<sup>2</sup> *Williams v. The New Albany & Salem R. R. Co.*, 5 Ind. 111; *Indianapolis & Cin. R. R. Co. v. Townsend*, 10 Ind. 38; *Jeffersonville R. R. Co. v. Applegate*, 10 Ind. 49; *Indianapolis & Cin. R. R. Co. v. Meek*, *Same v. Brandon*, and *Same v. Hughes*, 10 Ind. 502; *Jeffersonville R. R. Co. v. Dougherty*, 10 Ind. 549; *Thayer v. St. Louis, Alton & Terre Haute R. R. Co.*, 22 Ind. 26; *McKinney v. Ohio & Miss. R. R. Co.*, 22 Ind. 99; *Jeffersonville, Madison & Indianapolis R. R. Co. v. O'Connor*, *supra*.

<sup>3</sup> *Jeffersonville R. R. Co. v. Martin*, 10 Ind. 416; *Evansville & Crawfordsville R. R. Co. v. Ross*, 12 Ind. 446.

<sup>4</sup> *Indiana Cent. Ry. Co. v. Gápen*, 10 Ind. 292; *Madison & Indianapolis R. R. Co. v. Kane*, 11 Ind. 375; *Indianapolis, Pittsburgh & Cleveland R. R. Co. v. Fisher*, 15 Ind. 203; *Pres. and Directors of Terre Haute & Richmond R. R. Co. v. Smith*, 19 Ind. 42; *Indianapolis & Cin. R. R. Co. v. McClure*, 26 Ind. 370; *Mich. S. & N. Indiana R. R. Co. v. Fisher*, 27 Ind. 96.

<sup>5</sup> *Lafayette & Indianapolis R. R. Co. v. Shriner*, 6 Ind. 141; *Indianapolis & Cin. R. R. Co. v. Kinney*, 8 Ind. 402; *Indianapolis & Cin. R. R. Co. v. Caldwell*, 9 Ind. 397; *Pittsburgh, Cin. & St. Louis Ry. Co. v. Bowyer*, 45 Ind. 496.

<sup>6</sup> *Bellefontaine Ry. Co. v. Reed*, 33 Ind. 476. Where it is necessary that a certain space shall be kept open for the transaction of business, the company will not be liable, as for want of a fence, for live stock killed while in such

By the subsequent acts of 1859, the suit may be brought in the common pleas or in the circuit court in certain cases, and the act of 1853 is extended to suits brought in these courts,<sup>1</sup> and to cause liability in suits therein, requires proof of negligence.<sup>2</sup> And by an act of 1863, these several preceding acts are all essentially re-enacted into one.

Nor is it any excuse for not fencing, that the railroad runs alongside of a public highway; at such places, the necessity of a fence is increased, instead of diminished.<sup>3</sup> It is also held in Indiana that the owner of an injured animal may abandon him, under their statute, and recover his full value from the railroad company.<sup>4</sup>

All the animals killed at any one time, constitute, collectively, under the statute of Indiana (if we understand aright the decisions in that state), but one separate and indivisible cause of action.<sup>5</sup> If the value of the animal or animals killed, or the injury done, at any one time, does not exceed in the aggregate the sum of fifty dollars, the jurisdiction is confined to the jus-

place, without proof of negligence; but if unnecessary to keep it open, they are liable, irrespective of negligence: *Morris v. St. Louis, Kansas City & Northern Ry. Co.*, 58 Mo. 78, 9 Am. Ry. Rep. 96.

<sup>1</sup> *Evansville & Crawfordsville R. R. Co. v. Ross*, 12 Ind. 446.

<sup>2</sup> *Indianapolis & Cin. R. R. Co. v. Kercheval*, 16 Ind. 84.

<sup>3</sup> *Indianapolis & Cin. R. R. Co. v. Guard*, 24 Ind. 222; *Same v. McKinney*, *Id.* 283; *Jeffersonville, Madison & Indianapolis R. R. Co. v. Sweeney*, 32 Ind. 430.

<sup>4</sup> *Ohio & Mississippi R. R. Co. v. Hays*, 35 Ind. 173, 5 Am. Ry. Rep. 576.

<sup>5</sup> *Indianapolis & Cin. R. R. Co. v. Elliott*, 20 Ind. 430; *Indianapolis & Cin. R. R. Co. v. Kercheval*, 24 Ind. 139; *Toledo, Burlington & Logansport Ry. Co. v. Tilton*, 27 Ind. 71; *Lafayette & Indianapolis R. R. Co.*, and the *Indianapolis & Cin. R. R. Co.*, *v. Ehman*, 30 Ind. 83. This last action was for killing a cow and a heifer of plaintiff by the

cars, where the road was not fenced, and was brought in the court of common pleas of Marion county, Indiana. Judgment below for \$110. It was objected that, the evidence showing the heifer to have been of less value than fifty dollars, the common pleas had no jurisdiction as to her, and therefore that judgment should have gone for the value of the cow only, whereas it went for the combined value of both. The supreme court of Indiana say, as to this objection: "It is contended by the appellant's counsel that the cow and heifer were not both killed at the same time, and as the value of the heifer did not exceed fifty dollars, the common pleas court had no jurisdiction of that part of the case, and should, therefore, have found for the plaintiff the value of the cow only. The evidence shows that the cow and heifer were standing on the track, not over four feet apart, and were killed by the same train. They were killed so near the same in-



tices' courts;<sup>1</sup> and if the aggregate or combined value of all those killed, or of the injuries done, at one and the same time, amounts to more than fifty dollars, then the jurisdiction is in the circuit court, or court of common pleas.<sup>2</sup> But that if such killing or injury occur to one or more animals upon one and the same day, and at one time, and on one and the same day at another and different time, each of which separately causes less than fifty dollars damage, then these two causes of action are distinct, and can not be united to give jurisdiction to the circuit court or common pleas; for each day's mischief is a separate cause of action within itself, and within the justice's jurisdiction, of which the higher courts can not take jurisdiction separately; and not having jurisdiction of them separately, they can not take it collectively.<sup>3</sup> It is held, moreover, that to confer jurisdiction upon the circuit court, the killing or injury must have occurred after the statute went into effect; it is not retroactive in its nature, and therefore, causes of action for killing or injuring live stock accruing before the date of its taking effect, which were then actionable in a justice's court, must still be prosecuted therein.<sup>4</sup>

If the injury to the live stock be incurred while the road is in the hands and possession of a receiver judicially appointed, who is running the same, yet the action for damages must be against the

stant of time that the intervening period is inappreciable, and under such circumstances we fail to appreciate the objection." 30 Ind. 87.

<sup>1</sup>Toledo, Burlington & Logansport Ry. Co. v. Tilton, 27 Ind. 71; Lafayette & Ind's R. R. Co., and Ind's & Cin. R. R. Co., v. Ehman, 30 Ind. 83.

<sup>2</sup>Toledo, Burlington & Logansport Ry. Co. v. Tilton, 27 Ind. 71; Lafayette & Indianapolis R. R. Co., and Indianapolis & Cin. R. R. Co., v. Ehman, 30 Ind. 83. But objection to the jurisdiction of the justice can not be made for the first time in the appellate court: South & North Ala. R. R. Co. v. Brown, 53 Ala. 651, 13

Am. Ry. Rep. 166.

<sup>3</sup>Toledo, Burlington & Logansport Ry. Co. v. Tilton, 27 Ind. 71, 72.

<sup>4</sup>Indianapolis & Cincinnati R. R. Co. v. Elliott, 20 Ind. 430. In Missouri, there must be affirmative proof of the injury within the jurisdiction of the justice: Nall v. St. Louis, Kansas City & Northern Ry. Co., 59 Mo. 112, 8 Am. Ry. Rep. 447. An averment that the animal was killed at a point not fenced, and by law required to be fenced, is sufficient in a complaint before a justice. This implies the animal went upon the track at a place not fenced: Ohio & Mississippi Ry. Co. v. Miller, 46 Ind. 215, 7 Am. Ry. Rep. 240.

company, and not against the receiver.<sup>1</sup> And so if the injury be committed by the cars of the company other than the one owning the road, while running over and using the same under contract with the company owning the road, the company owning the road, and not the one committing the injury to live stock, will be liable under the statute.<sup>2</sup> But if the injury be occasioned by negligence, then doubtless the company committing would be subject to common law liability, although such company be not the owner of the road, and notwithstanding the statutory remedy against the company owning the same.

Ordinary negligence of the owner in allowing live stock to stray onto the track of a railroad, is now, in Indiana, no defense for the company as to a place required to be fenced, if they have not fenced the road.<sup>3</sup> If the injury occur at a place where the company have no right to fence, as at a crossing of a highway, or other place not within the statute, that fact must be set up by the plea or answer, and is for the defendant to prove.<sup>4</sup>

It is enough, in Indiana, if the plaintiff's petition or declaration allege the killing or injury, and that the road was not fenced, and that he prove the same; if at a place not allowable to be fenced, that must be pleaded and proved, as above stated, in avoidance of liability.<sup>5</sup>

<sup>1</sup> Ohio & Miss. R. R. Co. *v.* Fitch, 20 Ind. 498, 500; Louisville, New Albany & Chi. R. R. Co. *v.* Cauble, 46 Ind. 277. But see Ohio & Miss. R. R. Co. *v.* Davis, 23 Ind. 553, and *ante*, chap. 45, subdn. 2.

<sup>2</sup> Indianapolis & Madison R. R. Co. *v.* Solomon, 23 Ind. 534. But see Cincinnati & Martinsville R. R. Co. *v.* Paskins, 36 Ind. 380, 5 Am. Ry. Rep. 570. See also, Pittsburgh, Cincinnati & St. Louis Ry. Co. *v.* Bolner, 57 Ind. 572; Same *v.* Hannon, 60 Ind. 417; Same *v.* Currant, 61 Ind. 38; Cincinnati, H. & D. R. R. Co. *v.* Bunnell, *Id.* 183; Jeffersonville, Madison & Ind. R. R. Co. *v.* Downey, *Id.* 287.

<sup>3</sup> Jeffersonville, Madison & Indianapolis R. R. Co. *v.* O'Connor, 37 Ind. 95, 5 Am. Ry. Rep. 566; Pittsburgh,

Cin. & St. Louis R. R. Co. *v.* Brown, 44 Ind. 409; Indianapolis, Peru & Chi. R. R. Co. *v.* Wolf, 47 Ind. 250; Ohio & Miss. Ry. Co. *v.* McClure, Adm'r, 47 Ind. 317. But otherwise in Wisconsin: McCandless *v.* Chicago & Northwestern Ry. Co., 45 Wis. 365, 19 Am. Ry. Rep. 374.

<sup>4</sup> Pittsburgh, Cin. & St. Louis R. R. Co. *v.* Brown, 44 Ind. 409; Indianapolis, Peru & Chi. R. R. Co. *v.* Wolf, 47 Ind. 250.

<sup>5</sup> See Mobile & Ohio R. R. Co. *v.* Williams, 53 Ala. 595, 13 Am. Ry. Rep. 158. Negligence must be averred: *Ibid.* and South & North Ala. R. R. Co. *v.* Hagood, 53 Ala. 647, 13 Am. Ry. Rep. 161. An averment that the act charged is "to the damage of the plaintiff" in a specified sum, is a sufficient prayer for relief: Louisville,

Under the Indiana Statutes of 1853 and 1863, it is held in that state that actual contact of the cars or engine of the company with the animal injured is necessary to enable the owner to maintain an action against a railroad corporation for injury to live stock.<sup>1</sup> For an act of negligence, however, at common law, by which live domestic animals are injured by being recklessly driven into trestle work by a train of the company, an action will lie, although the animals be not touched by the engine or train.<sup>2</sup> But for an injury under like circumstances resulting merely from fright at the approaching train, and unaccompanied by any negligence on the part of the company, there is no liability.<sup>3</sup>

New Albany & Chicago Ry. Co. v. Smith, 58 Ind. 575, 19 Am. Ry. Rep. 18.

<sup>1</sup> Peru & Indianapolis R. R. Co. v. Hasket, 10 Ind. 409; Ohio & Miss. Ry. Co. v. Cole, 41 Ind. 331; Indianapolis, Bloomington & Western Ry. Co. v. McBrown, 46 Ind. 229; L., N. A. & C. Ry. Co. v. Smith, *supra*; Baltimore, P. & C. Ry. Co. v. Thomas, 60 Ind. 107. And see *Lafferty v. Hannibal & St. Joseph R. R. Co.*, 44 Mo. 291. It is held otherwise under the Kansas statute (Laws 1874, ch. 94): *Atchison, Topeka & Santa Fe R. R. Co. v. Jones*, 20 Kans. 527, 20 Am. Ry. Rep. 308. The statute imposed liability for injury "by the engine or cars on such railway, or in any other manner whatever in operating such railway": *Ibid.* See, also, *Atchison, Topeka & Santa Fe R. R. Co. v. Edwards*, 20 Kans. 531, 20 Am. Ry. Rep. 311. In this case the stock got upon the track where it was not fenced as required by law, and though not frightened by a train, they attempted to cross a bridge, and were caught between the ties and injured. The defendant was held not liable within said act; but negligence being found by the jury in the construction of the bridge, it was held liable on that ground. (But see *Memphis & Charleston R. R. Co. v. Lyon*, 62 Ala. 71.)

But for injuries caused by employees of the company in extricating the animals from their position after they were discovered, they were held liable under the stock act: *A., T. & S. F. R. R. Co. v. Edwards*, *supra*. Attorneys' fees having been allowed, as provided by the act, and assessed in gross, they were stricken out, as no mode of apportioning them could be gathered from the evidence: *Ibid.* Where the injuries inflicted upon a horse are of a character to render him valueless, the admission of evidence that he was, in consequence thereof, killed by employees of the road, will be held not to have prejudiced the defendant: *Welsh v. C., B. & Q. R. R. Co.*, 53 Ia. 632; *S. C. 6 N. W. Repr.* 13, 21 Am. Ry. Rep. 181. But railroad companies have been held not liable for injuries to cattle occasioned by falling into a well on their grounds, even where they have failed to fence: *Aurora Branch R. R. Co. v. Grimes*, 13 Ill. 585; *Ill. Cent. R. R. Co. v. Carraher*, 47 Ill. 333; *Hughes v. Hannibal & St. Joseph R. R. Co.*, 66 Mo. 325.

<sup>2</sup> *Ohio & Miss. Ry. Co. v. Cole*, 41 Ind. 331; *Indianapolis, Bloomington & Western Ry. Co. v. McBrown*, 46 Ind. 229; *Young v. St. Louis, Kansas City & Northern Ry. Co.*, 4 Ia. 172.

<sup>3</sup> *Peru & I. R. R. Co. v. Hasket*, *supra*.

Under the statute of Indiana in regard to fencing of railroads, it is a good defense of the company, to an action for killing or injuring live stock of an adjoining land holder by the cars of the company, that such land holder had contracted with the company to erect the fence himself, and to keep it up, and had been paid for so doing; but instead of erecting a proper and sufficient one, erected so poor a one that his live stock, turned by him into his own adjoining premises, got through on the railroad and were injured. The injury in such case was held to have been incurred in his own wrong.<sup>1</sup> And though the law is in the nature of a police regulation, the obligation of which, as we have seen, can not be released by the contract of a citizen with the company, yet the failure of the citizen to comply with the law will prevent a recovery by himself for injuries occasioned by his neglect to do so.<sup>2</sup>

And so where the railroad company has fenced its track as required by the statute, and by permission the adjoining land holder is allowed to make a private passway for his own use across the railroad, from field to field belonging to him, and adjoining to the road, and he himself neglects to keep the same in repair, by reason whereof his live stock gets onto the track and is injured or killed, without negligence of the company, by one of its trains, the company are not liable.<sup>3</sup> And the same rule holds good in regard to grantees of such land holder; and also to his tenant in possession of the premises.<sup>4</sup>

But though the crossing be a private one, yet if it be at a place where the company have a right to fence, that is, at where it is legal to make a fence, and it does not make one, or makes an insufficient one, or, making one, fails to keep it in repair, and stock be thus injured or killed by reason of such omission or ab-

<sup>1</sup> President, etc., of Terre Haute & Richmond R. R. Co. v. Smith, 16 Ind. 102; Indianapolis & Cin. R. R. Co. v. Adkins, 23 Ind. 340; Indianapolis, Pittsburgh & Cleveland R. R. Co. v. Petty, 25 Ind. 413; Cincinnati, H. & I. R. R. Co. v. Ridge, 54 Ind. 39; Balt., P. & C. R. W. Co. v. Johnson, 59 Ind. 188. And see Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Smith, 26 Ohio St. 124, 11 Am. Ry. Rep. 48.

<sup>2</sup> President, etc., of Terre Haute &

Richmond R. R. Co. v. Smith, 16 Ind. 102.

<sup>3</sup> The Indianapolis, Pittsburgh & Cleveland R. R. Co. v. Shimer, 17 Ind. 295; Indianapolis & Cin. R. R. Co. v. Adkins, 23 Ind. 340; Koutz v. Toledo, Wabash & Western Ry. Co., 54 Ind. 515.

<sup>4</sup> The Indianapolis, Pittsburgh & Cleveland R. R. Co. v. Shimer, 17 Ind. 295; Indianapolis, Pittsburgh & Cleveland R. R. Co. v. Petty, 25 Ind. 413.

sence of a sufficient fence, and the making of or keeping up the same has not devolved upon the owner of the injured animals, the company will be liable.<sup>1</sup>

The nature of the fence required of a railroad company is simply what is termed a legal one; "such an one as good husbandmen generally keep."<sup>2</sup> But if the company properly fence, they are liable only for negligence, and on common law principles.<sup>3</sup>

Under the statute of Indiana of 1853, railroad companies are not liable for injury to live stock as for want of a fence, and irrespective of negligence, willful misconduct, or unavoidable accident, in suits brought in the court of common pleas. In that court, there must be evidence on the part of the plaintiff to bring his case within the principles of the common law; he must not only prove the injury, but negligence or willful wrong, and that the same was the proximate cause of such injury, but must also show ordinary care on his part, or else he can not recover. It is only in actions before justices of the peace that the rule of the common law in this respect is changed.<sup>4</sup>

If the live stock or animals of a third person be stabled or kept upon the premises of an adjoining land owner, and stray onto and be injured on the railroad, where the company along said premises have neglected to, and yet were bound in law to, fence, then the owner of such animals has a right of action

<sup>1</sup> The Indiana Cent. Ry. Co. *v.* Leamon, 18 Ind. 173; Pittsburgh, Cincinnati & St. Louis Ry. Co. *v.* Eby, 55 Ind. 567, 16 Am. Ry. Rep. 244; McKinley *v.* C., R. I. & P. R. R. Co., 47 Ia. 76.

<sup>2</sup> Toledo & Wabash Ry. Co. *v.* Thomas, 18 Ind. 215, 217. Expert testimony is not admissible to determine whether a fence is suitable: Swartout *v.* N. Y. Cent. & H. R. R. Co., 7 Hun, 571; Enright *v.* San Francisco & S. J. R. R. Co., 33 Cal. 230. But see Louisville, New Albany & Chicago Ry. Co. *v.* Spain, 61 Ind. 460. If a barbed wire fence is used, means must be taken to prevent cattle from being driven thereon by fright, else the

company will be liable: Atlanta & West Point R. R. Co. *v.* Hudson, 62 Ga. 679.

<sup>3</sup> Toledo & Wabash Ry. Co. *v.* Thomas, 18 Ind. 215, 217.

<sup>4</sup> Jeffersonville R. R. Co. *v.* Martin, 10 Ind. (Tanner), 416. The mere exercise of one's own right, without wrong to another, or negligence resulting in wrong, will not render a person liable: Indianapolis & Cin. R. R. Co. *v.* Wright, 13 Ind. 213; Toledo, Wabash & Western R. R. Co. *v.* Hibbert, 14 Ind. 509. The rule is otherwise in Minnesota: Whittier *v.* Chicago, Milwaukee & St. Paul Ry. Co., 24 Minn. 394; S. C. 2 N. W. Repr. 20, 15 Am. Ry. Rep. 450.

against the company, to the same extent as would such land owner under the statute, if the animals injured were his own; the protection which the law places around the land owner's stock, inures also to the live stock of others on his premises by and with his concurrence and consent.<sup>1</sup>

Where, by law, railroad companies are required to fence their roads where they pass through inclosed grounds, and animals of an adjoining land owner are found injured or killed upon a railroad at a place in his inclosed grounds at which the railroad is not fenced, the presumption is, if nothing appear to the contrary, that the animals injured strayed onto the road at such unfenced place, and it is not necessary to prove that the animals entered thereon from the want of a fence;<sup>2</sup> and if the same be at a place where there is no public crossing, the company will be liable, so far as such liability, under the statute, may result from a failure to fence at that particular place.<sup>3</sup> Evidence is not admissible of the killing of other cattle running at large;<sup>4</sup> or of a failure to fence at other places, or neglect to repair at other times or places.<sup>5</sup>

<sup>1</sup> *Sawyer v. Vermont & Mass. R. R. Co.*, 105 Mass. 196; *Marietta & Cincinnati R. R. Co. v. Stephenson*, 24 Ohio St. 48, 6 Am. Ry. Rep. 428. But otherwise when the cattle are unlawfully there: *Giles v. Boston & Maine R. R.*, 55 N. H. 552, 11 Am. Ry. Rep. 203. See further, *Curry v. Chicago & Northwestern Ry. Co.*, 43 Wis. 665, 16 Am. Ry. Rep. 219; *ante*, chap. 26, subdn. 4.

<sup>2</sup> *Fickle v. St. Louis, Kansas City & Northern R. W. Co.*, 54 Mo. 219; *Aubuchon v. St. Louis & I. M. R. R. Co.*, 52 Mo. 522; *Spinner v. New York Central & Hudson River R. R. Co.*, 67 N. Y. 153, 15 Am. Ry. Rep. 126. In the case first above cited, the court refer to the seeming dissent on this point, in *Cecil v. Pacific R. R.*, 47 Mo. 246, as not to be regarded as ignoring the principle here held. See *Toledo, Peoria & Warsaw Ry. Co. v. Pineo*, 56 Ill. 308, 4 Am. Ry. Rep. 534, as to evidence of injury. By statute,

in some states, the mere fact of the injury is made *prima facie* proof of negligence: *Louisville & Nashville R. R. Co. v. Brown*, 13 Bush, 475; *Kentucky Cent. R. R. Co. v. Lebus*, 14 Bush, 518; *Atlantic & Gulf R. R. Co. v. Griffin*, 61 Ga. 11; *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595; *Little Rock & Fort Smith R. R. Co. v. Payne*, 33 Ark. 816. But in such case the company may relieve itself from liability by showing proper care: *L. R. & F. S. R. R. Co. v. Payne*, *supra*; *Durham v. Wilmington & Weldon R. R. Co.*, 82 N. Car. 352. See *Mobile & O. R. R. Co. v. Williams*, *supra*.

<sup>3</sup> *Fickle v. St. Louis, Kansas City & Northern R. W. Co.*, 54 Mo. 219; *Marietta & Cincinnati R. R. Co. v. Stephenson*, *supra*.

<sup>4</sup> *McCandless v. Chicago & North Western Ry. Co.*, 45 Wis. 365, 19 Am. Ry. Rep. 374.

<sup>5</sup> *Great Western R. R. Co. v. Morthland*, 30 Ill. 451; *Chicago, Burlington*

The rule of law that exempts a railroad company from fencing its road at public crossings of highways and streets, applies to such streets and highways as have been dedicated or lawfully established as such, whether improved so as to be used or not. There can be no right to fence up a road or street which is established by law; and where there is no right to do so, there is no duty devolving on the company to fence.<sup>1</sup> Therefore, to hold the company liable for injury to live stock caused at such places by its trains, actual negligence must be shown;<sup>2</sup> but if the injury occur where the company have a right to fence, and are required to, then no negligence need be proved to render it liable.<sup>3</sup>

And so, under the statute of Indiana, if live stock stray onto a railroad at a point where it ought to be, but is not, fenced, and proceed to a place where it is not fenced, and can not legally be fenced, and be there injured or killed, without having left the road, and the killing is by contact of the engine or cars, the company are liable in an action for the damages.<sup>4</sup>

The exemption from the obligation to fence, under the statute of Indiana, is not construed by the courts of that state to extend to places in cities, towns or villages, outside of the district where there are streets and street crossings, although situate within the corporate limits.<sup>5</sup>

Under said statute of March 4th, 1863, liability to suit for damages exists as well against the owners of the road, as all.

& Quincy R. R. Co. v. Farrelly, 3 Bradw. (Ill.), 60; Brooks v. N. Y. & E. R. R. Co., 13 Barb. 594; Cecil v. Pac. R. R. Co., 47 Mo. 246; Miss. Cent. R. R. Co. v. Miller, 40 Miss. 45.

<sup>1</sup> Meyer v. North Mo. R. R. Co., 35 Mo. 352.

<sup>2</sup> Meyer v. North Mo. R. R. Co., 35 Mo. 352; Gerren v. Hannibal & St. Joseph R. R. Co., 60 Mo. 405, 9 Am. Ry. Rep. 247.

<sup>3</sup> Powell v. Hannibal & St. Jos. R. R. Co., 35 Mo. 457. Thus where a highway has not been used by the public for thirty-six years, an abandonment will be presumed, and the railroad company will not be excused from fencing: Jeffersonville, Madison

& Indianapolis R. R. Co. v. O'Connor, 37 Ind. 95, 5 Am. Ry. Rep. 566.

<sup>4</sup> Toledo, Wabash & Western Ry. Co. v. Howell, 38 Ind. 447; Jeffersonville, Madison & Indianapolis R. R. Co. v. Lyon, 55 Ind. 477, 16 Am. Ry. Rep. 250. And see Witthouse v. Atlantic & Pacific R. R. Co., 64 Mo. 523, 17 Am. Ry. Rep. 296.

<sup>5</sup> Jeffersonville, Madison & Indianapolis R. R. Co. v. Parkhurst, 34 Ind. 501; and so in Ohio: Cleveland & Pittsburg R. R. Co. v. McConnell, 26 Ohio St. 57, 11 Am. Ry. Rep. 266. And see Crawford v. N. Y. Cent. & H. R. R. R. Co., 18 Hun, 108; Ellis v. Pac. R. R. Co., 48 Mo. 231.

others operating or using the same, for damages occasioned by them, by injury to live stock upon the road, as for want of a fence.<sup>1</sup> If a fence be built, and get out of repair, then a reasonable time is allowed, by the ruling of the courts, in which to learn of the same and make repairs;<sup>2</sup> and in some cases it is decided that a week is more than a reasonable time;<sup>3</sup> in others, that from Thursday until Sunday is time enough to learn of the defect and repair the same.<sup>4</sup> In the case last cited, it is said that if the company run trains on Sunday, they may well be required to repair fences on Sunday.

Though the statute of Illinois, in requiring railroad companies to fence their roads, defines the road intended as one "sufficient to prevent cattle, horses, sheep and hogs, from getting on such railroad," yet the remedy for injuries growing out of the want of such fence is intended to apply as well to injuries to asses and mules, as to cattle, horses, sheep and hogs.<sup>5</sup> To our mind, the reference here to the latter is purely as descriptive of the kind of fence required; if sufficient to turn cattle, horses, sheep and hogs, then there is no liability without negligence, but if not so, then liability accrues for killing or for injury to live stock, whether horses or mules, asses or cattle. The liability created

<sup>1</sup> Huey v. The Indianapolis & Vincennes R. R. Co., 45 Ind. 320; Fort Wayne, Muncie & Cin. R. R. Co. v. Hinebaugh and others, 43 Ind. 354. See also Houston & Great Northern R. R. Co. v. Meador, 50 Tex. 77. But see Cincinnati & Martinsville R. R. Co. v. Paskins, 36 Ind. 380, as to what allegations are sufficient.

<sup>2</sup> Cleveland, Columbus, Cin. & Indianapolis R. R. Co. v. Brown, 45 Ind. 90; Pittsburgh, Cin. & St. Louis Ry. Co. v. Eby, 55 Ind. 567; Toledo, Wabash & Western Ry. Co. v. Nelson, 77 Ill. 160; Davis v. Chi., R. I. & P. Ry. Co., 40 Ia. 292; McCormick v. Same, 41 Ia. 193; Wheeler v. Erie Ry. Co., 2 Thomp. & C. 634; Lawrence v. Mil., Lake Shore & Western Ry. Co., 42 Wis. 326.

<sup>3</sup> Cleveland, Columbus, Cin. & In-

dianapolis R. R. Co. v. Brown, 45 Ind. 90; Toledo, Wabash & Western R. W. Co. v. Cohen, 44 Ind. 444.

<sup>4</sup> Toledo, Wabash & Western Ry. Co. v. Cohen, 44 Ind. 444.

<sup>5</sup> Ohio & Miss. R. R. Co. v. Brubaker, 47 Ill. 462; Toledo, Wabash & Western Ry. Co. v. Cole, 50 Ill. 184. Under the English statute, pigs are held to be included within the term "cattle": Child v. Hearn, Law Rep. 9 Exch. 176. But see Atchison, Topeka & Santa Fe R. R. Co. v. Yates, 21 Kans. 613. Expert testimony is not admissible to prove the sufficiency of the fence: Swartout v. N. Y. Cent. & H. R. R. R. Co., 7 Hun, 571. But see Louisville, New Albany and Chicago Ry. Co. v. Spain, 61 Ind. 460.



by the statute is for injury to "live stock," which term applies as well to asses and mules, as to cattle, horses, hogs or sheep.

The killing or injury of live stock upon a railroad by its train, in Illinois, at a place where there is no fence, and yet ought to be one, does not involve liability if the animals get on where there is a proper fence, and by leaping or breaking the same;<sup>1</sup> and so if they get on at a public crossing, or other place where it is not allowable to fence, and are killed there, or are killed at a place elsewhere on the road, where there is no fence, and yet ought to be one, yet the company are not liable. In each of these cases, to render the railroad company liable, the killing must be wantonly done, or, in the language of Illinois courts, with gross negligence.<sup>2</sup>

But if the company fail to fence its road at all, at a place where by the law it ought to fence, or, fencing it, make an insufficient fence, or, having made a sufficient fence, fails to keep the same in repair for an unreasonable time, and live stock go onto the road by reason of either of such failures, and are there killed or injured by the trains of the company, then the company is liable for the damages, irrespective of the question of negligence on the part of the company;<sup>3</sup> and, by a recent ruling, irrespective also of the owner's allowing the animals to go at large near a railroad crossing, in case the killing be accompanied with gross negligence; but not for ordinary or slight negligence.<sup>4</sup> In actions, however, for such injuries, the ownership must in all cases correspond with the claim made by plaintiff. If the action is joint, the ownership must be joint; if individual, the ownership must be individual.<sup>5</sup>

<sup>1</sup> And see *Child v. Hearn*, *supra*.

<sup>2</sup> *Logansport, Peoria & Burlington R. R. Co. v. Caldwell*, 38 Ill. 280; *Chicago & Alton R. R. Co. v. Utley*, 38 Ill. 410; *St. Louis, Alton & Terre Haute R. R. Co. v. Linder and others*, 39 Ill. 433; *Ohio & Miss. Ry. Co. v. Clutter*, 82 Ill. 123. And see *Cary v. St. Louis, Kansas City & Northern R. W. Co.*, 60 Mo. 209; *Small v. Chicago, Rock Island & Pacific R. R. Co.*, 50 Ia. 338.

<sup>3</sup> *St. Louis, Alton & Terre Haute*

*R. R. Co. v. Linder and others*, 39 Ill. 433; *Chicago, B. & Q. R. R. Co. v. Magee*, 60 Ill. 529; *Rockford, Rock Island & St. Louis R. R. Co. v. Lynch*, 67 Ill. 149; *Toledo, Peoria & Warsaw Ry. Co. v. Pence*, 68 Ill. 524; *Same v. Logan*, 71 Ill. 191; *Same v. Lavery*, *Id.* 522; *Same v. Delehanty*, *Id.* 615; *Ohio & Miss. Ry. Co. v. Clutter*, 82 Ill. 123.

<sup>4</sup> *Headen v. Rust*, 39 Ill. 186, 194.

<sup>5</sup> *St. Louis, Alton & Terre Haute R. R. Co. v. Linder and others*, 39 Ill.

In Tennessee, under the statute,<sup>1</sup> the burden of proof, in actions against railroad companies for injury to live stock, is, after the killing or injury is shown, thrown upon the defendant to justify or excuse the act.<sup>2</sup>

In such action, the evidence of the agent, engineer or employe is excluded.<sup>3</sup> But this exclusion of evidence is held to apply only to the evidence of the particular engineer, agent or employe of the company, whose alleged negligence or fault is involved in the inquiry, or is alleged to have caused the injury; it does not extend to agents, employes or servants of the company generally.<sup>4</sup>

On a trial for injury to live stock by a railroad train, an experienced locomotive engineer is competent to testify, as an expert, as to whether the injury could have been avoided, in view of the distance proven between the approaching train and the animals, at the time of their appearance in view upon the track.<sup>5</sup> And if, from the evidence of the case, it shall appear to the jury that due care would not have prevented the injury, then it is their duty to find for defendant, and the court should so instruct.<sup>6</sup>

In Alabama the law is stated as follows in a recent case: "a railroad company is liable for injuries to stock when they result from the negligence of its servants or agents, whenever and wherever it may occur. If the injury occurs at or near any public road crossing, or any regular depot or stopping place, or within the corporate limits of any town or city, or because of an obstruction which could or ought to have been

433. Ownership must be proved: *Welsh v. C., B. & Q. R. R. Co.*, 53 Ia. 632; *S. C. 6 N. W. Repr.* 13, 21 *Am. Ry. Rep.* 181. But possession is *prima facie* evidence of ownership: *Toledo, Wabash & Western Ry. Co. v. Stevens*, 63 Ind. 337.

<sup>1</sup> Code, 1166.

<sup>2</sup> *Horne v. The Memphis & Ohio R. R. Co.*, 1 Cold. 72; *Nashville & Chat. R. R. Co. v. Fugett*, 3 Cold. 402.

<sup>3</sup> *Horne v. The Memphis & Ohio R. R. Co.*, 1 Cold. 72; *Nashville & Chat. R. R. Co. v. Fugett*, 3 Cold. 402.

<sup>4</sup> *Nashville & Chat. R. R. Co. v.*

*Fugett*, 3 Cold. 402; *Horne v. The Memphis & Ohio R. R. Co.*, 1 Cold. 72.

<sup>5</sup> *Bellefontaine & Indiana R. R. Co. v. Bailey*, 11 Ohio St. 333; *Same v. Fifer*, 11 Ohio St. 339; *Richmond & Danville R. R. Co. v. Anderson*, 31 Gratt. 812. And so as to the proper place for the brakeman under a given state of facts: *Cincinnati & Zanesville R. R. Co. v. Smith*, 22 Ohio St. 227.

<sup>6</sup> *Bellefontaine & Indiana R. R. Co. v. Bailey*, *supra*; *Same v. Fifer*, 11 Ohio St. 339.

perceived, no degree of diligence will excuse the company from liability, unless all the requirements of the statute have been observed. In either case, the injury being shown, the burden of proof is on the railroad company to acquit itself of negligence, or to show a compliance with the statute."<sup>1</sup> The act of that state of April 23, 1873, is not compulsory upon either railroad companies or owners of stock, and does not increase the liability of railroad companies.<sup>2</sup> Under the provision of the statute of that state for making presentment of claims to the railroad company, it is held, that if the company appoint an agent to attend to such matters, a presentment to him is sufficient;<sup>3</sup> and proof that such agent inquired after the claim and offered to settle it, will authorize the presumption of a presentment.<sup>4</sup>

**3. Under the statute as for a defective fence.**—Though the statute requires the company to make and keep up a fence, it is not to be construed to mean that it shall be constantly kept up—that it may never get out of order, without thereby placing the company in the light of violating the statute; on the contrary, it is well settled, that where a proper fence is once made, then if it from any cause becomes defective or insufficient, or is thrown down or left open, that it is the duty of the company to know and ascertain the same within a reasonable time, and thereafter, within a still further reasonable time, to repair or restore the fence to a proper condition.<sup>5</sup> This defense, however, must

<sup>1</sup> *Mobile & Ohio R. R. Co. v. Williams*, 53 Ala. 595, 13 Am. Ry. Rep. 153.

<sup>2</sup> *South & North Ala. R. R. Co. v. Hagood*, 53 Ala. 647, 13 Am. Ry. Rep. 161. The stock act of that state of Feby. 3, 1877, making railroad companies absolutely liable for injury to stock, irrespective of negligence, is declared unconstitutional in *Zeigler v. S. & N. Ala. R. R. Co.*, 58 Ala. 594, 20 Am. Ry. Rep. 463.

<sup>3</sup> *S. & N. Ala. R. R. Co. v. Hagood*, *supra*; *Same v. Brown*, 53 Ala. 651, 13 Am. Ry. Rep. 166; *Union Trust Co. v. Kendall*, 20 Kans. 515, 20 Am. Ry. Rep. 294. Under the Kansas Act

(Ch. 94, Laws 1874), there must be proof of a demand in accordance with sec. 2 of the act, in order to sustain the action: *Kansas Pacific Ry. Co. v. Ball*, 19 Kans. 535, 19 Am. Ry. Rep. 46. A demand made upon a general superintendent is good: *Central Branch R. R. Co. v. Ingram*, 20 Kans. 66, 19 Am. Ry. Rep. 218. Proof of service of notice upon a "station agent of the road" is sufficient: *Welsh v. C., B. & Q. R. R. Co.*, 53 Ia. 632; *S. C. 6 N. W. Repr.* 13, 21 Am. Ry. Rep. 181.

<sup>4</sup> *S. & N. Ala. R. R. Co. v. Hagood*, *supra*.

<sup>5</sup> *Aylesworth v. Chi., Rock Isld. &*

be pleaded and proved.<sup>1</sup> Thus, a railroad company is not liable for injuries resulting from such temporary destruction of its fences, or by the fence being thrown down or left open by other persons than its own employes, officers, or agents, until it has notice thereof, or a reasonable time has elapsed for obtaining notice thereof, and in which to make the required repair, or remedy the evil.<sup>2</sup> In such cases, the company are without fault; and having discharged its duty to the public by making a fence, is, under the statute, not liable for subsequent defects, if diligence has been used to discover and remedy any defect or injury to, or leaving open, the fences.<sup>3</sup>

Such, too, is the doctrine in Illinois. Though railroad companies are bound, under the statute, to keep the fences of their road in repair, when they have once fenced, yet they are entitled to a reasonable time to learn of the same being out of repair, in case of a breach, and are not chargeable with instantaneous notice thereof. They are, moreover, entitled to have a reasonable time in which to repair the same after learning of the defect, but must do so with most diligent dispatch; and, therefore, where the fence is shown to have been in good order on Saturday in the evening, and found out of repair on Monday morning, the company are not chargeable with neglect of duty in obtaining information thereof, and are not liable for injuries inflicted by reason thereof, without other fault on their part.<sup>4</sup> But where the bars of a farm

*Pacif. R. R. Co.*, 30 Iowa, 459; *Lemmon v. The Chicago & N. Western R. Co.*, 32 Iowa, 151; *McCormick v. C., R. I & P. Ry. Co.*, 41 Ia. 193; *Brown v. Mil. & Prairie Du Chien Ry. Co.*, 21 Wis. 39; *Antisdell v. Chicago & N. Western Ry. Co.*, 26 Wis. 145; *Laude v. Chicago & N. Western Ry. Co.*, 33 Wis. 640; *Jones v. Chicago & Northwestern Ry. Co.*, 49 Wis. 352; *S. C. 1 Am. & Eng. R. R. Cases*, 61; *Toledo & Wabash R. R. Co. v. Fowler*, 22 Ind. 316; *Indianapolis, P. & C. R. R. Co. v. Truitt*, 24 Ind. 162; *Toledo, Wabash & Western Ry. Co. v. Cohen*, 44 Ind. 444; *Cleveland, Columbus, Cin. & Indianapolis R. R. Co. v. Brown*, 45 Ind. 90; *Ill. Cent. R. R. Co. v.*

*Swearingen*, 33 Ill. 289; *Toledo, Wabash & Western Ry. Co. v. Nelson*, 77 Ill. 160; *Indianapolis & St. Louis R. R. Co. v. Hall*, 88 Ill. 368, 21 Am. Ry. Rep. 311.

<sup>1</sup> *Jeffersonville, Madison & Indianapolis R. R. Co. v. Sullivan*, 38 Ind. 262, 10 Am. Ry. Rep. 279.

<sup>2</sup> *Toledo & Wabash R. R. Co. v. Fowler*, 22 Ind. 316; *Chicago & Alton R. R. Co. v. Saunders*, 85 Ill. 288; *Indianapolis & St. Louis R. R. Co. v. Hall*, 88 Ill. 368. But see *Hammond v. Chicago & North Western R. R. Co.*, 43 Ia. 168, 14 Am. Ry. Rep. 412.

<sup>3</sup> *Toledo & Wabash R. R. Co. v. Fowler*, 22 Ind. 316, 319, 320.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Swearingen*,

crossing are left down and entirely neglected for the space of three months, when the statute requires the company to erect and maintain a sufficient fence, and where cattle are by law allowed to go at large, if then an animal stray into the close of the adjoining land holder, at whose premises the neglected bars are thus down, and enter onto the railroad through the same, and be there injured or killed, the railroad company is liable to respond in damages for the loss: it being negligent, under the statute, in allowing the bars to remain out of order for an unreasonable time.<sup>1</sup>

Where the adjoining land owner has, for a valuable consideration, agreed to build and keep in repair the fence, he can not recover for an injury to his stock caused by his failure to repair, even though the insufficiency was caused by a casualty, unless the injury is intentional, or the result of gross carelessness.<sup>2</sup>

The duty to properly fence the road is not discharged by merely making a contract to have it done, if the performance is insufficient.<sup>3</sup>

47 Ill. 206; *Chi. & N. W. Ry. Co. v. Barrie*, 55 Ill. 226; *Chicago, Burlington & Quincy R. R. Co. v. Magee*, 60 Ill. 529; *Ind. & St. L. R. R. Co. v. Hall*, *supra*. The company are entitled to a reasonable time in which to learn of the breach, and after that a sufficient time to repair, with diligence: *Ill. Cent. R. R. Co. v. Swearingen*, *supra*; *Chi. & N. W. Ry. Co. v. Barrie*, *supra*.

<sup>1</sup> *Ill. Cent. R. R. Co. v. Arnold*, 47 Ill. 173. And see *Jones v. Chicago & Northwestern Ry. Co.*, 49 Wis. 352; *S. C.*, 1 *Am. & Eng. R. R. Cas.* 61. The complaint must allege that the road was not securely fenced: *Indianapolis, Cincinnati & Lafayette R. R. Co. v. Robinson*, 35 Ind. 380, 4 *Am. Ry. Rep.* 544. Even at common law, an allegation was necessary that the injury did not result from negligence of the plaintiff: *Ibid.* See *Cleveland, Columbus, Cincinnati & Indianapolis R. W. Co. v. Crossley*, 36 Ind. 370, 5 *Am. Ry. Rep.* 552, as to the construction of

a release of damages occasioned by the repair of the road—*held*, not to release damages for injury to stock.

<sup>2</sup> *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Smith*, 26 Ohio St. 124, 11 *Am. Ry. Rep.* 48. But the mere fact that the owner erected the fence, will not release the company from liability for its non-repair: *Jeffersonville, Madison & Indianapolis R. R. Co. v. Sullivan*, 38 Ind. 262, 10 *Am. Ry. Rep.* 279. It is also held in this state, under act of Mar. 25, 1859 (1 S. & C. 331), making it the duty of both the owner and the company to maintain certain fences, that if the owner, knowing the fence to be insufficient, turns his stock into the field, he can not recover for their injury: *Sandusky & Cleveland R. R. Co. v. Sloan*, 27 Ohio St. 341. But in the absence of such a statute, the adjoining owner would not be required to repair: *Downing v. Chicago, Rock Island & Pacific R. R. Co.*, 43 Ia. 96, 14 *Am. Ry. Rep.* 406.

<sup>3</sup> *Gill v. Atlantic & Great Western*

When the road is properly fenced, the company is held to the exercise of ordinary care only to prevent injury to stock; but if not properly fenced, a higher degree of care is required.<sup>1</sup>

Where cattle are unlawfully pasturing in land adjoining the road, the company will not be liable for their injury, though occasioned by defective fences, which the company was bound to repair.<sup>2</sup>

Evidence is not admissible that another cattle guard, constructed like the one the defect of which caused the injury, has proven sufficient;<sup>3</sup> nor, on the other hand, is evidence admissible of a neglect on the part of the company to repair at other times or places.<sup>4</sup>

The question whether an owner is guilty of contributory negligence in turning an animal, known by him to be breachy, and accustomed to jump or break fences, into a lot adjoining a railroad, where the animal is injured in consequence of a defect in the fence, is for the jury.<sup>5</sup> Such negligence, if found, would be proximate, and would prevent a recovery.<sup>6</sup>

Where the complaint charges defendant with negligence, and avers plaintiff's freedom from negligence, defendant may show contributory negligence by plaintiff under a general denial.<sup>7</sup>

Ry. Co., 27 Ohio St. 240, 11 Am. Ry. Rep. 51. The question whether the fence is properly constructed is for the jury: *Hammond v. Chicago & Northwestern R. R. Co.*, 43 Ia. 168, 14 Am. Ry. Rep. 412; *McKenly v. Chicago, Rock Island & Pacific R. R. Co.*, 43 Ia. 641, 14 Am. Ry. Rep. 495. And the company will be presumed to know of the defects, if they might acquire such knowledge by reasonable care: *Hammond v. C. & N. W. R. R. Co.*, *supra*.

<sup>1</sup> *Gill v. A. & G. W. Ry. Co.*, *supra*; *Henderson v. Chicago, Rock Island & Pacific R. R. Co.*, 43 Ia. 620, 14 Am. Ry. Rep. 484; *Robinson v. Grand Trunk Ry. Co.*, 32 Mich. 322.

<sup>2</sup> *Giles v. Boston & Me. R. R. Co.*, 55 N. H. 552, 11 Am. Ry. Rep. 203.

<sup>3</sup> *Downing v. Chicago, Rock Island & Pacific R. R. Co.*, 43 Ia. 96, 14 Am. Ry. Rep. 406.

<sup>4</sup> *Great Western R. R. Co. v. Morth-*

*land*, 30 Ill. 451; *Chicago, Burlington & Quincy R. R. Co. v. Farrelly*, 3 Bradw. (Ill.), 60; *Brooks v. N. Y. & E. R. R. Co.*, 13 Barb. 594; *Cecil v. Pac. R. R. Co.*, 47 Mo. 246; *Miss. Cent. R. Co. v. Miller*, 40 Miss. 45. The condition of the fence shortly after the injury may be proved: *Mackie v. Cent. R. R. Co.*, 54 Ia. 540; *S. C. 6 N. W. Repr.* 723. And where the fence is generally insecure, proof of the particular place of entry by cattle is unnecessary: *Louisville, New Albany & Chicago Ry. Co. v. Spain*, 61 Ind. 460.

<sup>5</sup> *Jones v. Sheboygan & Fond du Lac R. R. Co.*, 42 Wis. 306, 15 Am. Ry. Rep. 229. See, also, *Lawrence v. Milwaukee, Lake Shore & Western Ry. Co.*, 42 Wis. 322, 15 Am. Ry. Rep. 366.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

4. **Liability as for double damages under the statute.**—To enable a plaintiff to recover double the value of stock killed by a railroad company, it is not sufficient to serve the company with a notice thereof, and a copy of the affidavit of value; there must be a notice in writing, “accompanied by an affidavit of the injury or destruction of the property”—not a copy of the affidavit, but the affidavit itself. The Supreme Court of Iowa say, that the company “are entitled to the original, and to all the benefits which may accrue from it, together with the assurance and certain knowledge that such an affidavit has been made, and that they are not imposed upon by an alleged copy, in no way authenticated, of an assumed affidavit, though in fact never made”; and that the liability to double the value is only upon failure to pay the real value, thirty days after “notice in writing, accompanied by an affidavit of the destruction of the property.”<sup>1</sup>

Where a statute requires the fencing of railroads, and declares that the owners of unfenced railroads shall be liable to double damages for live stock “killed or injured by the cars or locomotive, or other carriages,” on such roads, it is held that, to charge the railroad company with liability under the statute, an actual collision of the cars, locomotive or other carriage is necessary; and for an injury resulting otherwise, there is no liability under the statute.<sup>2</sup> In the case here cited from 44 Mo., the injured animal ran on the track before the train until it came to a culvert; which it jumped clear of, but fell to one side of the track, and in falling received the injury, without being struck by the train or any part thereof; the ruling was that the case was not within the statute.<sup>3</sup>

The ruling in Missouri, under the statute, is that negligence is presumed in law when the killing or injury occurs at a place where there is no public crossing, and where the road is uninclosed, although it be on uninclosed prairie or wild lands. The

<sup>1</sup> *McNaught v. The C. & N. W. R. Co.*, 30 Iowa, 336, 338, 339; *Mendell v. C. & N. W. Ry. Co.*, 20 Iowa, 9; *Campbell v. The Chi., Rock Isl'd & Pacific R. R. Co.*, 35 Iowa, 334.

<sup>2</sup> *Lafferty v. Hannibal & St. Joe R. R. Co.*, 44 Mo. 291; *The Peru & Ind. R. R. Co. v. Hasket*, 10 Ind. 409; In-

dianapolis, *Bloomington & Western R. R. Co. v. McBrown*, 46 Ind. 229; *Louisville, New Albany & Chi. Ry. Co. v. Smith*, 58 Ind. 575; *Balt., P. & C. Ry. Co. v. Thomas*, 60 Ind. 107.

<sup>3</sup> *Lafferty v. Hannibal & St. Joe R. R. Co.*, 44 Mo. 291.

presumption arises by force of the statute.<sup>1</sup> And, in that state, the allowing of one's live stock to go at large upon the prairie is not imputable to the owner as negligence, in case of their being injured; it is no more than the owner has a lawful right to do. Live stock are free commoners under the laws of Missouri.<sup>2</sup>

It is no defense, in Missouri, to an action against a railroad company for negligent injury to live stock, that the owner permitted such stock to run at large upon the open prairie;<sup>3</sup> nor if such answer be coupled with the allegation of gross negligence in that respect, as the running at large not being unlawful in that state, it can not be imputed to the owner as negligence.<sup>4</sup> Nor can a set-off be maintained, in such an action, for damages to the train, when no new ground thereof be stated than the facts alleged in plaintiff's petition, except the alleged cause of the negligence so charged by defendant on plaintiff, in allowing his live stock to go at large.<sup>5</sup> Some distinct facts must be alleged to support a set-off.<sup>6</sup>

By the statute of Missouri, justices of the peace have jurisdiction of all suits against a railroad company for damages occasioned by injuries to, or the killing of, live stock; and this, too, without regard to the value of the stock injured or killed, or the amount of damages claimed in such suits.<sup>7</sup> And in such cases, where the case is within the statute allowing double damages for such injuries, the justice of the peace may legally render a judgment for double the amount of the verdict, upon the finding by the jury of a specified sum as simple damages.<sup>8</sup>

<sup>1</sup> *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Burton v. North Mo. R. R. Co.*, 30 Mo. 372; *Brown v. Hannibal & St. Joe R. R. Co.*, 33 Mo. 309; *Calvert v. Hannibal & St. Joe R. R. Co.*, 34 Mo. 242; *Lantz v. St. Louis, Kansas City & Northern R. W. Co.*, 54 Mo. 228. The fence must be upon both sides of the track: *Tredway v. Sioux City & St. Paul R. R. Co.*, 43 Ia. 527, 14 Am. Ry. Rep. 475.

<sup>2</sup> *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Clark's admx. v. Hann. & St. Joe R. R. Co.*, 36 Mo. 202; *Tarwater v. Hannibal & St. Joe R. R. Co.*, 42 Mo. 193.

<sup>3</sup> *Gorman v. Pacific R. R. Co.*, 26 Mo. 441; *Tarwater v. Hann. & St. Joe R. R. Co.*, 42 Mo. 193.

<sup>4</sup> *Tarwater v. Hann. & St. Joe R. R. Co.*, 42 Mo. 193.

<sup>5</sup> *Tarwater v. Hann. & St. Joe R. R. Co.*, 42 Mo. 193.

<sup>6</sup> *Tarwater v. Hann. & St. Joe R. R. Co.*, 42 Mo. 193.

<sup>7</sup> *Hudson v. St. Louis, Kansas City & N. Ry. Co.*, 53 Mo. 525; *Parish v. Mo., Kans. & Tex. R. R. Co.*, 63 Mo. 284, 20 Am. Ry. Rep. 417.

<sup>8</sup> *Brewster v. Link*, 28 Mo. 147; *Norton v. Hannibal & St. Joe R. R. Co.*, 48 Mo. 387; *Hudson v. St. Louis,*



Under the statute of Missouri, giving a right of action for double damages, in certain cases, against railroad companies, for injury to, or for killing animals, the action may be brought in the name of the owner of the animals killed or injured, notwithstanding a cotemporary statute of the same state providing that actions for penalties against railroad companies may be brought in the name of the state. It is there held that if the infliction of double damages is to be regarded as a penalty, so that the same may be prosecuted and recovered in the name of the state, that such remedy is not exclusive of the individual right of action, but is merely cumulative thereto.<sup>1</sup>

To recover double damages under the statute of Iowa, for injuries to, or for killing of live stock, all other needful showings concurring, an affidavit made by a person or persons other than the owner of the stock is sufficient, if, with the proper notice, it be brought home to the knowledge of the railroad company.<sup>2</sup> Nor is it absolutely necessary that such affidavit identify or name the owners; the statute requires notice to the owner, accompanied with an affidavit of the injury and value, but does not expressly require the owner to be named therein, or himself to swear thereto. The notice will necessarily inform the company who to pay to, in order to avoid double damages.<sup>3</sup>

An obligation entered into by a railroad corporation to pay to an adjoining land holder, as a consideration for a right of way

Kansas City & N. Ry. Co., 53 Mo. 535; *Parish v. M., K. & T. R. R. Co.*, *supra*. The proper practice is for the jury to render a verdict for single damages, and the court may then render judgment for double damages: *Wood v. St. Louis, Kansas City & Northern Ry. Co.*, 58 Mo. 169, 9 Am. Ry. Rep. 84.

<sup>1</sup> *Hudson v. St. Louis, Kansas City & Northern Ry. Co.*, 53 Mo. 525; *Fickle v. St. Louis, Kansas City & Northern Ry. Co.*, 53 Mo. 219. In that state, an action for damages can not be brought under both the 43d section of the Railroad Law (Wagner's Stat. 317), and the 5th section of the Damage Act (Wagner's Stat. 520), but must be brought under the one

applicable to the case: *Wood v. St. L., K. C. & N. Ry. Co.*, *supra*. Injuries resulting from the negligent management of the locomotive or train can not be recovered under the former section; suit must be brought under the latter: *Crutchfield v. Same*, 64 Mo. 255, 17 Am. Ry. Rep. 200. And although it be averred that the injury was negligently done, still, if direct reference is made in the petition to the former section, and the right of action be predicated upon a failure to fence, it will be treated as brought under that section: *Ibid*.

<sup>2</sup> *Henderson v. St. L., K. C. & N. R. Co.*, 36 Iowa, 387.

<sup>3</sup> *Henderson v. St. L., K. C. & N. R. Co.*, 36 Iowa, 387.

by him granted, "whatever damage might be done to his property by the running of the cars," will not render the company liable to pay for injuries growing out of the land holder's own negligence.<sup>1</sup> Thus, where the land holder, in such case, confines his live stock in an inclosure which embraces a portion of the railroad of the company making such obligation, with no bars or other appliances to restrain them from entering upon the track of the road, it is held to be such negligence on the part of the owner of the animals as prevents a recovery on his part for injuries inflicted on such animals by trains on the road, at such place, if without the willful wrong act of the company.<sup>2</sup>

In Indiana, and in Nebraska, it is held that the statute giving double damages to the owner for live stock killed or injured by a railroad company, at places on the road where the road is unfenced, and at which the company have a right to fence, is unconstitutional and void, so far as it relates to double damages.<sup>3</sup> It is valid, however, under the constitution, in respect merely to the requirement of a fence; it is in that respect but a police regulation, designed more for the protection of the public, say the Supreme Court of Indiana, than for the benefit of the owner of the live stock.<sup>4</sup>

**5. Liability for injuries where road is in the hands of a receiver.**—The fact that a railroad is placed, by the order of a court of the United States, in the hands and possession of a receiver, and is being operated by him, is no defense to an action against the company, under the statute of Indiana, for damages incurred by plaintiff by the killing or injury of live stock by trains or engines of the company, while the road is so operated by the

<sup>1</sup> Indianapolis, Pittsburg & Cleveland R. R. Co. v. Brownburg, 32 Ind. 199.

<sup>2</sup> *Ibid.*

<sup>3</sup> Madison & Indianapolis R. R. Co. v. Whiteneck, 8 Ind. 217; Indiana Cent. R. W. Co. v. Gapen, 10 Ind. (Tanner), 292; Atchison & Nebraska R. R. Co. v. Baty, 6 Brown (Neb.), 37, 15 Am. Ry. Rep. 63. But see, *contra*, Jones v. Galena & Chicago Union R. Co., 16 Ia. 6; Tredway v. Sioux City & St. Paul R. R. Co., 43 Ia. 527,

14 Am. Ry. Rep. 475; Welsh v. C., B. & Q. R. R. Co., 53 Ia. 632; S. C. 6 N. W. Repr. 13, 21 Am. Ry. Rep. 181; Mackie v. Cent. R. R. Co., 54 Ia. 540; S. C. 6 N. W. Repr. 723; Cairo & St. Louis R. R. Co. v. Peoples, 92 Ill. 97; Same v. Warrington, *Id.* 157; Kaes v. Mo. Pac. Ry. Co., 6 Mo. App. 397; Little Rock & Fort Smith R. R. Co. v. Payne, 33 Ark. 816.

<sup>4</sup> New Albany & Salem R. R. Co. v. Tilton, 12 Ind. (Tanner), 3.

receiver.<sup>1</sup> The receiver operates and runs the road subject to the liability of the corporation for live stock killed or injured by its trains; the law makes the company, and not the receiver, liable for such injuries.<sup>2</sup>

In an action for stock killed, against a railroad company, while in the hands of a trustee for bondholders, the plaintiff recovered judgment. The trust deed directed that the expenses of running and keeping the road in order should be first paid out of the earnings. Subsequently, the bondholders purchased and reorganized the road. Thereupon plaintiff sued the new company on the judgment, averring that the trustee had paid all the earnings of the road to the bondholders, leaving his claim unpaid. On demurrer to the complaint, it was held insufficient in omitting to state the amount, if any, of such earnings coming to the hands of the trustee.<sup>3</sup>

<sup>1</sup> Ohio & Miss. R. R. Co. v. Fitch, 20 Ind. 498; McKinney v. Ohio & Miss. R. R. Co., 22 Ind. 99. But see Ohio & Miss. R. R. Co. v. Davis, 23 Ind. 553.

<sup>2</sup> Herron v. Vance, 17 Ind. 595; Ohio & Miss. R. R. Co. v. Fitch, 20 Ind. 498; McKinney v. Ohio & Miss. R. R. Co., 22 Ind. 99. But see Ohio & Miss.

R. R. Co. v. Davis, *supra*.

<sup>3</sup> Nicholson v. Louisville, New Albany & Chicago Ry. Co., 55 Ind. 504, 16 Am. Ry. Rep. 258. A corporation in possession as such trustee is a railway corporation, within the Kansas statute, and liable for stock killed: Union Trust Co. v. Kendall, 20 Kans. 515, 20 Am. Ry. Rep. 294.

## CHAPTER LXIII.

### STREET RAILWAYS.

	Section.		Section.
Right of way for, . . . .	1	Ordinary or common law liability . . . . .	5
Entitled to the right of the road . . . .	2	Unlawful imposition of burdens on, . . . . .	6
Liability of, under statute, for improvements and assessments . . . .	3	Police regulations of street railways . . . . .	7
Status of statutory liability for injuries to persons . . . .	4		

**1. Right of way for.**—There is no essential difference, upon legal principles, of a general nature, as to the necessity for the right of way, in towns and cities, between street railways and ordinary railways; they stand upon the same footing as to the right to occupy or use the public streets.<sup>1</sup> But, technically speaking, a street railway is not a railroad.<sup>2</sup>

In some of the states, power is conferred upon towns and cities to sell or grant the use of streets for street railway purposes;<sup>2</sup> and where there are such statutory regulations on the subject, they will, of course, supersede and control the general law.

The grant of the right, by a city council, to build and operate

<sup>1</sup> *The City of Janesville v. Milwaukee & Miss. R. R. Co.*, 7 Wis. 484; *Ford v. The Chicago & North Western R. R. Co.*, 14 Wis. 609; *Pomeroy v. Milwaukee & Chicago R. R. Co.*, 16 Wis. 640; *Veazie v. Penobscot R. R. Co.*, 49 Maine, 119; *Brown v. Duplessis*, 14 La. Ann. 854; *Warren R. R. Co. v. The State*, 5 Dutcher, 353.

<sup>2</sup> *Louisville & Portland R. R. Co. v. The Louisville City Rail W. Co.*, 2 Duvall (Ky.), 175, 178.

<sup>3</sup> *Brown v. Duplessis*, 14 La. Ann. 854; *Stanley v. City of Davenport*, 54 Ia. 463, 6 N. W. Repr. 706; *S. C. 2 N. W. Repr. 1064*. See *Chicago &*

*North Western Ry. Co. v. People*, 91 Ill. 251; *City of Quincy v. Chicago, Burlington & Quincy R. R. Co.*, 92 Ill. 21; *Cairo & Vincennes R. R. Co. v. People*, *Id.* 170; *Edwardsville R. R. Co. v. Sawyer*, *Id.* 377. Under sections 411 and 412 of the Municipal Code of Ohio, a grant by a city council of the right to build a street railroad must be made by ordinance directly to the grantee, to be therein named; the authority to make the grant can not be delegated to any officer or board: *State, ex rel. Henderson, v. Bell*, 34 Ohio St. 194, 21 Am. Ry. Rep. 84.

a railway for the carriage of passengers in the streets of a city, is not necessarily such a monopoly, or of such an exclusive character, as to prohibit the grant of a similar privilege to others, to lay and operate railways in the same street or streets, by means of additional tracks to be laid therein.<sup>1</sup>

If, after the obtention of the right to erect and operate a railway in the streets of a city, the grantee transfer the privileges, as to a portion of the city, or lines granted, this is a matter which concerns the public only, and may be approved by the city council.<sup>2</sup>

The grant of a right of way in the streets of a city to a street railway company, with a clause in it providing that, "as respects the grading, paving, macadamizing, filling or planking of the streets, or parts of the streets, upon which they shall construct their said railways, or any of them," the company shall "keep eight feet in width along the line of" the "railway on all the streets where one track is constructed, and sixteen feet in width along the line of said railway where two tracks are constructed, in good repair and condition during all the time to

<sup>1</sup> *Oakland R. R. Co. v. The Oakland, Brooklyn & Fruit Vale R. R. Co.*, 45 Cal. 365; *Brooklyn City & Newtown R. R. Co. v. Coney Island & B. R. R. Co.*, 35 Barb. 364; *Brooklyn Central R. R. Co. v. Brooklyn City R. R. Co.*, 32 *Id.* 358; *New York & Harlem R. R. Co. v. 42d St. R. R. Co.*, 50 Barb. 285; *Sixth Ave. R. R. Co. v. Gilbert Elevated R. R. Co.*, 41 N. Y. Superior, 489, 43 *Id.* 292; *Canyonville & G. Road Co. v. Stephenson*, 8 Oreg. 263. And even where the city has, by contract, granted exclusive rights in the streets, and agreed not to allow other railways on adjoining streets, such rights may be, like any other property, condemned for the use of a new company: *Metropolitan City Ry. Co. v. Chicago West Div. Ry. Co.*, 87 Ill. 317, 19 Am. Ry. Rep. 64. Such contract rights are no part of the company's franchise, but are in the nature of property: *Ibid.* The grant of an

exclusive right to construct and operate horse railways is not infringed by the construction of a steam railway: *Denver & Swansea Ry. Co. v. Denver City Ry. Co.*, 2 Col. 673, 20 Am. Ry. Rep. 339. If a railroad company has laid its tracks upon a street without authority of law, another company, having obtained a legal franchise to lay its tracks thereon, may remove the others for that purpose: *Omnibus R. R. Co. v. Baldwin*, 57 Cal. 160; *S. C. 1 Am. & Eng. R. R. Cas.* 316. A grant to a second company upon the same street is void, under the code of California, if it do not provide that the company shall pay an equal portion of the cost of the track used by both: *Ibid.*

<sup>2</sup> *Oakland R. R. Co. v. The Oakland, Brooklyn & Fruit Vale R. R. Co.*, 45 Cal. 365. See *City of Quincy v. C., B. & Q. R. R. Co.*, *supra*.

which" the privileges granted shall extend, does not impose upon the company the obligation to pave, grade, macadamize or curb such streets, or any part of them, in the first instance, but merely the duty or obligation of keeping the same in repair to the width stipulated, when the same shall have been improved by the city. The obligation is to repair, and not to construct.<sup>1</sup>

A mere grant, without words of exclusiveness, of the privilege of laying street car tracks, and of operating a street railway thereon in the street or streets of a city, will not confer on the grantee the exclusive right thereof, as against the power of the city, if the public convenience is adjudged to demand it, to authorize others to lay and operate railways in the same streets, upon similar tracks of railway;<sup>2</sup> and the grantee in the older grant has no cause of complaint as against a like privilege granted to another by the common grantor.<sup>3</sup>

Under an act of the state of Illinois, allowing horse railway companies to condemn property, it is held that one company can not condemn a fragment of the roadway of a competing company, although it might condemn even the whole road.<sup>4</sup>

When, by statute, power is conferred upon municipal authorities to regulate street railways, and the removal of snow and ice from the tracks thereof, as in their judgment the interest and convenience of the public may require, an ordinance or regulation of such municipal authorities, allowing the removal of snow and ice from the tracks of street railways on permit from the superintendent of streets or other person in control thereof, is valid, and an injunction to prevent the enforcement thereof will not be allowed.<sup>5</sup> The removal of snow and ice from the tracks necessarily involves, to some extent, the increasing it on the streets adjoining such tracks, and causing more or less obstruction to the ordinary travel; hence the necessity of police regulation of the same.<sup>6</sup>

<sup>1</sup> *City of Chicago v. Sheldon*, 9 Wall. 50.

<sup>2</sup> *New Orleans City R. R. Co. v. Crescent City R. R. Co.*, 23 La. An. 759.

<sup>3</sup> *New Orleans City R. R. Co. v. Crescent City R. R. Co.*, 23 La. An. 759.

<sup>4</sup> *Central City Horse Ry. Co. v. Fort*

*Clark Horse Ry. Co.*, 81 Ill. 523, 9 Am. Ry. Rep. 375.

<sup>5</sup> *Union R. W. Co. v. Mayor and Aldermen of Cambridge and another*, 11 Allen, 287.

<sup>6</sup> *Union R. W. Co. v. Mayor and Aldermen of Cambridge and another*, 11 Allen, 287. And see *Short v. Baltimore City Pass. Ry. Co.*, 50 Md. 73.

The validity of a municipal ordinance will be judicially examined into only upon application of some one on whom it confers a right, imposes a duty, or inflicts a wrong;<sup>1</sup> therefore, an ordinance granting railway privileges in streets can not be tested judicially by a private party, showing in himself no other rights or injury than such as inure to other citizens generally.<sup>2</sup> Thus an injunction will not lie, at the suit of a private individual, to restrain a street railway company from changing its track, when authorized by the city authorities, or by ordinance, to make such change, on the mere ground that the plaintiff is the owner of property on the street, and that the public health will be likely to suffer by reason of such change.<sup>3</sup>

The ruling in some of the states has been, as for instance in the courts of New York (three of the judges dissenting), that the establishing of a horse railroad in public streets of cities is an imposition of a new or additional burden upon the land of the adjoining land holder, covered by such streets; that he is entitled to compensation by reason thereof, and may inhibit such appropriation, by an injunction, until compensation is made.<sup>4</sup> But in the same court it is held, in a previous decision, that the erection and use of such roads imposes no additional burden;<sup>5</sup> so that, in New York, the question can scarcely be said to have been reliably settled.

But the better doctrine, as we conceive, is opposed to that laid down in *Craig v. Rochester City & Brighton R. R. Co.*, and coincides with the rule first asserted in 27 New York—that is, to the extent that where, by such structure and use, no private right is invaded, or private injury sustained, which are peculiar to himself, as by being deprived of that free access to, and egress from, his own adjoining premises, which he would otherwise

<sup>1</sup> *Hoyle v. New Orleans City R. R. Co.*, 23 La. An. 535; *Market Str. Ry. Co. v. Central Ry. Co.*, 51 Cal. 583, 12 Am. Ry. Rep. 219.

<sup>2</sup> *Hoyle v. New Orleans City R. R. Co.*, 23 La. An. 535; *Market Str. Ry. Co. v. Cent. Ry. Co.*, *supra*.

<sup>3</sup> *Hoyle v. New Orleans City R. R. Co.*, 23 La. An. 535.

<sup>4</sup> *Craig v. Rochester City & Brighton R. R. Co.*, 39 N. Y. 404.

<sup>5</sup> *The People v. Kerr*, 27 N. Y. 204; S. C. 37 Barb. 357; *City of New York v. Kerr*, 38 Barb. 369; *Kellinger v. Forty-second St. R. R. Co.*, 50 N. Y. 206; *Sixth Ave. Ry. Co. v. Gilbert Elevated R. R. Co.*, 43 N. Y. Superior, 292; S. C. 41 *Id.* 489. See *Brooklyn Cent. & J. R. R. Co. v. Brooklyn City R. R. Co.*, 33 Barb. 420.

have a legal right to enjoy, the adjoining land holder has no claim to compensation as for an additional burden imposed upon his property, or as for taking private property for public use.<sup>1</sup>

Nor is it enough to entitle such adjoining proprietor to compensation, that he is, by such structure and its use, deprived of some mere convenience previously enjoyed in the exercise of his approach to his property; it must interfere with his actual rights in that respect. Thus, where the objection was, as in the case above cited from 27 Wisconsin, 194, that the adjoining property was used by the owner as a wholesale store, and that the erection and use of the horse street railroad so encroached upon the street in front thereof, that drays and wagons could not, as they previously had used to, be backed up at right angles with the course of the street and sidewalk, to more conveniently unload and receive their freight, for that the heads of the horses would come in contact with the cars of the railroad, the court held that the interference was not with any right of the complainant, and that although allowed by mere sufferance to previously thus occupy the street by such vehicles in loading and unloading at the store, it was in itself an encroachment on the right of travel along the street, and that no such right pertained to the ownership of the adjoining proprietor; that when the space thus occupied by him is required for public travel, then such occupancy or user by him is a public nuisance and he must turn his teams the other way—that is, lengthwise the street, which may be done, and yet the

<sup>1</sup> Hobart v. Mil. City R. R. Co., 27 Wis. 194; Cincinnati & S. G. Ave. Street Railway Co. v. Cumminsville, 14 Ohio St. 523; Sargent v. Ohio & Miss. R. R. Co., 1 Handy, 52; Brown v. Duplessis, 14 La. An. 854; Elliott v. Fair Haven & Westville R. R. Co., 32 Conn. 579; Commonwealth v. Temple, 14 Gray, 75; Chase v. The Sutton Manf. Co., 4 Cush. 152; Atty. Genl. v. Metropolitan R. R., 125 Mass. 515; New Albany & Salem R. R. Co. v. O'Daily, 12 Ind. 551; Grand Rapids & Ind. R. R. Co. v. Heisel, 38 Mich. 62; Stanley v. City of Davenport, 54 Ia.

463; S. C. 6 N. W. Repr. 706. The ruling in the case of Hobart v. Mil. City R. R. Co., *supra*, seems to be partially departed from in Chapman and another v. The Oshkosh & Miss. River R. R. Co., 33 Wis. 629, wherein it is said that the additional burden is to be compensated for, less the diminution caused by the land being already a highway, and out of the proprietor's exclusive possession; but that the value of the land itself is not to be allowed, as the proprietor has already, or previously, been deprived thereof by the highway.



loading and unloading take place without any great additional trouble or inconvenience to him.<sup>1</sup>

Where, by ordinance, the company is to lay its track within a certain time, and before the expiration of that time the ordinance is amended and the time extended, the extension will run from the time of expiration of the old limitation.<sup>2</sup> And a contemporaneous agreement between the company and the common council, by which the former agreed to postpone laying the track for ten years, was held not to amount to an abandonment;<sup>3</sup> the effect of this contract was to extend the time ten years more, running from the date of the ordinance agreeing to the delay, and it was not to be taken from any of the time granted.<sup>4</sup>

A grant of a thing not yet *in esse* is inoperative, for want of that to which it may attach; as, for instance, a clause in a legislative charter of a railway company, giving the right "to connect with any passenger railway now constructed, or hereafter to be constructed."<sup>5</sup> A right, it is said, is a relation of a person or persons to some thing or person; and from its very nature can not arise or exist in advance of the persons and things to which it is to relate.<sup>6</sup> In other words, if the thing to which it relates be not in existence, then the grant has nothing to which it can attach, and, therefore, carries no right at all. Nor could it attach without the consent, express or implied, of the company erecting such subsequent structure, or unless a provision to that effect be inserted in the charter of the latter company; it would impair their rights.

In New York it is held that the act of that state of 1868,<sup>7</sup> entitled "An act supplementary to chapter 489 of the Laws of 1867, and to provide for the collection and application of revenue in the county of New York, in certain cases," is obnox-

<sup>1</sup> 27 Wis. 201, 202; Cincinnati & Spring Grove Ave. Street Railway Co. v. Cummins, 14 Ohio St. 523.

<sup>2</sup> McNeil v. Chicago City Ry. Co., 61 Ill. 150, 12 Am. Ry. Rep. 457.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* Where the law requires work to be commenced within a given time, without prescribing the character or extent of it, if any work, though inconsiderable, is done, the finding of

the trial court to that effect will not be disturbed: Omnibus R. R. Co. v. Baldwin, 57 Cal. 160; S. C. 1 Am. & Eng. R. R. Cas. 316.

<sup>5</sup> North Branch Passenger Railway Co. v. City Passenger Ry. Co., 38 Penn. St. (2 Wright), 361.

<sup>6</sup> North Branch Passenger Railway Co. v. City Passenger Ry. Co., 38 Penn. St. 361.

<sup>7</sup> Ch. 855, Laws 1868.

ious to the constitutional provision that a private or local bill shall embrace but one subject, which shall be expressed in its title,—in that it authorized a street railway company, which was by prior acts confined to the use of stationary engines for motive power, to use any mode of propulsion which should be approved by commissioners. But it was further held that any defect in the act was obviated by the act of 1875,<sup>1</sup> securing to the road in question the rights, privileges and franchises of another road, and giving the former company the right to use any motor power so approved.<sup>2</sup> The latter act, it was held, did not violate the constitutional provision prohibiting a private or local bill granting the right to lay tracks, or any exclusive privilege or franchise; the act conferred no new franchises, but simply confirmed and regulated franchises previously possessed by the W. S. & Y. P. Railway Co., to which the N. Y. Elevated R. R. Co. had succeeded.<sup>3</sup> And a bill waiving a forfeiture of corporate rights, or extending the term within which corporate rights might be exercised, or giving the right to use a new or different motive power, provided the right is not exclusive, would confer no new substantial rights within this inhibition.<sup>4</sup> And so an act providing for the construction of elevated and underground railroads is not a local or private bill within the purview of such inhibition, it being a general act in terms;<sup>5</sup> and the provisions of such act conferring upon commissioners appointed thereunder, power to determine upon the necessity of such roads, and to fix the routes and prescribe the plan of construction, confers no legislative powers upon them, and the legislature has authority to confer such powers.<sup>6</sup> The further provision of said act authorizing elevated roads in actual operation at the time of the passage of the act to construct connections, etc., is not violative of such constitutional provision, as it was not a private bill by reason of applying only to existing companies, nor did it grant any exclusive privilege; nor would it have been obnoxious in the lat-

<sup>1</sup> Ch. 595, Laws 1875.

<sup>2</sup> Matter of Petition of N. Y. Elevated R. R. Co., 70 N. Y. 327, 19 Am. Ry. Rep. 152.

<sup>3</sup> *Ibid*; Gilbert Elevated Ry. Co. v. Kobbe, *Id.* 361, 19 Am. Ry. Rep. 186.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid*; Gilbert Elevated Ry. Co. v. Kobbe, *supra*. The case of Barto v. Himrod, 8 N. Y. 483, is distinguished in the latter case.

ter respect if it gave an exclusive right in one street, so long as other routes were permitted.<sup>1</sup>

No evidence is admissible for the purpose of showing that a statute, valid upon its face, is unconstitutional,—as in this case to show that there was but one elevated railway in actual operation so as to be entitled to the benefits of the act.<sup>2</sup> The provision of the constitution (art. 3, sec. 18), and of sec. 4 of the Rapid Transit Act, requiring the consent of property owners, or a certificate from the supreme court commissioners, and the consent of the local authorities, it was held, did not apply to the Gilbert Elevated Railway Co; this requirement applies only to street railroads organized under general laws.<sup>3</sup> So, in Ohio, the consent of property owners required by the act of 1866,<sup>4</sup> as amended in 1868,<sup>5</sup> is not required since the amendment of sec. 412 of the municipal code. The consent there provided for, by whomsoever obtained, inures to the benefit of the lowest bidder.<sup>6</sup>

In California it is held that a law exempting particular railroads from conditions imposed upon railroads in general is unconstitutional and void.<sup>7</sup>

**2. Entitled to the right of the road.**—Where, by grant from the municipal authority, a company has a right to lay down and operate a street railway in the streets of a city, and by ordinances of such city, the street cars are entitled to precedence over other vehicles and things, the street cars of such company are entitled to the right of way, or right of the road, on their own track, over other vehicles and persons passing. And under an ordinance making it penal for any person to “unnecessarily obstruct or impede the running” of such cars, it is the duty of persons using other vehicles to give the way to the street cars on their tracks, without unnecessary delay; and refusing so to do, they are guilty of an obstruction thereof. Remaining on the track or tracks of such railway any unnecessary length of time with other vehicles or things, after being required by circumstances, or on request, to remove, amounts

<sup>1</sup> *Ibid*; Gilbert Elevated Ry. Co. v. Kobbe, *supra*.

<sup>2</sup> *Ibid*; G. E. Ry. Co. v. Kobbe.

<sup>3</sup> G. E. Ry. Co. v. Kobbe.

<sup>4</sup> 63 Ohio L. 55; S. & S. 137.

<sup>5</sup> 65 Ohio L. 112; S. & S. 139.

<sup>6</sup> State, *ex rel.* Henderson, v. Bell, 34 Ohio St. 194, 21 Am. Ry. Rep. 84.

<sup>7</sup> Omnibus R. R. Co. v. Baldwin, 57 Cal. 160; S. C. 1 Am. & Eng. R. R. Cas. 316.

to an obstruction, and may be punished as such.<sup>1</sup> In such cases, it becomes necessary for the party using the ordinary vehicle to get out of the way, as soon as the same can be done; and he may not consult his convenience, but may remain no longer than is necessary to enable him to get out of the way. In the case cited from 14 of Gray,<sup>2</sup> the Supreme Court of Massachusetts says: "Several things are here to be observed. The cars could only pass on one precise line. The wagon could deviate to the right or to the left, within the limits of the traveled part of the road. The public, by the grant of the franchise, had granted the right to move on that precise line, and had given to all passengers the right to be carried on that line at the usual rate of speed at which passengers are carried by horses, subject only to occasional necessary impediments. The cars can not so move, and the passengers can not be so carried, whilst the wagon moves on the track. No impediment is shown to prevent the wagon from turning out. The wagon therefore was for the time being an unnecessary obstruction of the public travel." This doctrine is referred to and re-affirmed in the case above cited from Iowa, of the State *v. Foley*, 31 Iowa, 527.

No actual request is necessary for the removal of such obstruction or giving of the right of way, in order to fix upon the person thus intruding on the track, liability under the ordinance. The street railway company "is entitled to the unrestricted use of its rails (say the court in *Wilbrand v. The Eighth Avenue R. R. Co.* above cited), for the progress of its cars," within the limit of speed allowed by law; and the driver of any other vehicle, being unnecessarily on the track, is bound to exercise greater care than if upon the common pavement, to see that the approaching car is not impeded; and if, through willfulness or negligence in this respect, a collision ensues, he should not have damages against the company, even though the servants of the latter are also at fault.<sup>3</sup> For the ordinary team,

<sup>1</sup>The State *v. Foley*, 31 Iowa, 527; S. C. 7 Am. R. 166; *Wilbrand v. Eighth Avenue R. R. Co.*, 3 Bosw. 314; *Hegan v. Eighth Ave. R. R. Co.*, 15 N. Y. 380; *Adolph v. Cent. Park, N. & E. River R. R. Co.*, 65 N. Y. 554, 76 N. Y. 530, 33 N. Y. Superior, 186,

43 *Id.* 199; *Metropolitan R. R. Co. v. Quincy R. R. Co.*, 12 Allen, 262, 270; *Commonwealth v. Temple*, 14 Gray, 74, 77.

<sup>2</sup>The *Commonwealth v. Temple*, 14 Gray, 69, 77, 78.

<sup>3</sup>*Wilbrand v. Eighth Avenue R. R.*

if not intruders before, become such so soon as their presence on the track is in hindrance of the street car, which can go only on the one track; therefore, if from such obstruction, injury ensues, without other fault of the street car company than simply pursuing its course, the company are not liable for the injury.<sup>1</sup> And even if the company be also in fault, but the fault be not such as to willfully cause the injury, or else be of a greatly higher degree of negligence than that of the plaintiff, there can be no recovery against the company.<sup>2</sup> But if injury be willfully inflicted by the driver of the car, within the scope of his duty, as by intentionally running against and breaking a carriage in order to clear the track, the company is liable.<sup>3</sup>

The rights of the public and of the company operating street railways are mutual, and each must use ordinary and reasonable care to avoid injury.<sup>4</sup> The company have only a paramount right in this—that it is entitled to the track on meeting other vehicles, inasmuch as the street cars can go only on that particular line, and other vehicles can go with equal ease in any part of the street. Therefore, when one or the other is to give the right of the road, those traveling by ordinary methods must do it.<sup>5</sup> And footmen may travel thereon as well as others, observing, as others, ordinary care to avoid injury; simply being there is not contributory negligence, unless under circumstances amounting to carelessness.<sup>6</sup>

A grant to a railroad company of a privilege of using a street for constructing and operating therein a railroad, does not preclude the making a similar grant to another railroad; a mere grant carries with it no right of monopoly. The number of lines

Co., 3 Bosw. 314, 320, 321; *Commonwealth v. Hicks*, 7 Allen, 573; *Jersey City & B. R. R. Co. v. Jersey City & H. Horse R. R. Co.*, 5 C. E. Green, 61; *Adolph v. C. P., N. & E. R. R. Co.*, *supra*. The contrary of this seems to be ruled in *Shea v. Potrero & B. V. R. R. Co.*, 44 Cal. 414, to the extent of entirely ignoring the doctrine of contributory negligence. In other respects, the decision coincides substantially with the foregoing doctrine.

<sup>1</sup> *Chi. West Div. Ry. Co. v. Bert*, 69 Ill. 388.

<sup>2</sup> *Chi. West Div. Ry. Co. v. Bert*, 69 Ill. 388.

<sup>3</sup> *Cohen v. Dry Dock, East Broadway & Battery R. R. Co.*, 69 N. Y. 170, 18 Am. Ry. Rep. 109.

<sup>4</sup> *Shea v. The Portrero & Bay View R. R. Co.*, 44 Cal. 414; *Meyer v. Lindell Ry. Co.*, 6 Mo. App. 27; *Adolph v. C. P., N. & E. R. R. Co.*, *supra*.

<sup>5</sup> *Shea v. The Portrero & Bay View R. R. Co.*, 44 Cal. 414.

<sup>6</sup> *Shea v. The Portrero & Bay View R. R. Co.*, *supra*.

may be increased in a street, as regards a mere grant of privilege, at the option of the municipal authorities having control of the streets.<sup>1</sup>

The laying of a street railroad is not an exclusive appropriation of the street, or any portion of it; it is a special mode of using the street, which does not exclude the public use.<sup>2</sup> And another railroad may cross their track, if necessary.<sup>3</sup> But this right in the public to use the track will not authorize a rival transportation company to use it in competition with the railroad company.<sup>4</sup>

**3. Liability of, under statute, for street improvements and assessments.**—Where, by law, street railroad companies are required to “keep the space between the rails in thorough repair, by paving, planking or macadamizing,” such obligation is construed to mean, between the two rails of each track only, and not in the space which lies between the several tracks, as distinct from each other—as, for instance, if there be two or more tracks, composed of two rails each, then the improvement is required to be made between the rails of each of such tracks, but not in that part of the street lying between these tracks; it being unoccupied by the trains, is not within the requirements of the law.<sup>5</sup>

But it is decided in the same state (by a divided court, however,) that the interest of a street railway company in the streets

<sup>1</sup> The Oakland R. R. Co. v. Oakland, Brooklyn & Fruit Vale R. R. Co., 45 Cal. 365; *ante*, subd'n I.

<sup>2</sup> Market Str. Ry. Co. v. Central Ry. Co., 51 Cal. 583, 12 Am. Ry. Rep. 219; Citizens' Coach Co. v. Camden Horse R. R. Co., 33 N. J. Eq. 267; S. C. 1 Am. & Eng. R. R. Cas. 190.

<sup>3</sup> Market Str. Ry. Co. v. Central Ry. Co., 51 Cal. 583, 12 Am. Ry. Rep. 219.

<sup>4</sup> Camden Horse R. R. Co. v. Citizens' Coach Co., 28 N. J. Ch. 145, 14 Am. Ry. Rep. 20; C. C. Co. v. C. H. R. R. Co., 33 *Id.* 267; S. C. 1 Am. and Eng. R. R. Cas. 190; Jersey City & B. R. R. Co. v. Jersey City & H. Horse R. R. Co., 5 C. E. Green, 61; Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 138, 72 N. Y. 330; Buffalo Str. R. R. Co. v. Leigh-

ton, 10 Repr. 149. And see Matter of Brooklyn, W. & N. Ry. Co., 72 N. Y. 245, 19 Hun, 314. By sec. 54 of the “Tramways Act,” 33 & 34 Vict. ch. 78, the user of tramways by unlicensed persons with carriages “having flange wheels, or other wheels suitable only to run on the rail of such tramway,” is prohibited. Under this act, it is held that a revolving disk on the inner side of the wheels, operated by a lever so as to have the effect of a flange, came within the prohibition of the act: Cottam v. Guest, Law Rep., 6 Q. B. Div. 70; S. C. 1 Am. and Eng. R. R. Cas. 574.

<sup>5</sup> Robbins v. Omnibus R. R. Co., 32 Cal. 472; City of St. Louis v. St. Louis R. R. Co., 50 Mo. 94.

of a city wherein its road is located, built and operated, is real property, within the definition of the statute in regard to widening streets, and is susceptible of being benefited thereby; and that, therefore, such interest or property is liable to assessment by special taxation therefor.<sup>1</sup>

A street railway company has a franchise, which is a property of a character to be substantially benefited by the paving of such street, and is liable to assessment therefor.<sup>2</sup>

The charter of the Chicago West Division Ry. Co. provided, that as to "the grading, paving, macadamizing, filling or planking" of the streets, a certain width should be kept by the company in good repair, and where "any new improvement, paving, re-paving, planking or re-planking is ordered," the company should make "such new improvements," as to such width, in the same manner as abutting owners on the street. In a proceeding to recover an assessment for filling, paving and grading, it was *held* that the words "any new improvement" were not limited as to kind by the words "paving, re-paving, planking or re-planking;" but that the obligation to make new improvements was the same as to make repairs, and included the cost of filling and grading.<sup>3</sup> And evidence that the company had never been required to pay for filling in previous assessments, and had been reimbursed for filling done by them, was held inadmissible.<sup>4</sup>

**4. Status of statutory liability for injuries to persons.**—It is held in Missouri that the special act of the legislature of that state, entitled "An act concerning street railroads in the city of St. Louis," approved January 16, 1860, and which declares that "said railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car," does not apply to the Bellefontaine Railway Company of St. Louis;<sup>5</sup> and, therefore, as to injuries received by a passenger upon said road, in getting on or off the cars at their front, the question of liability remains as at common law, and is not a matter of statutory consideration.<sup>6</sup> Moreover,

<sup>1</sup> Appeal of North Beach & Mission R. R. Co., 32 Cal. 499.

<sup>2</sup> Chicago v. Baer, 41 Ill. 306; Parmelee v. City of Chicago, 60 Ill. 267; New Haven v. Fair Haven & Westville R. R. Co., 38 Conn. 422.

<sup>3</sup> Chicago West Division Ry. Co. v.

City of Chicago, 15 Am. Ry. Rep. 437.

<sup>4</sup> *Ibid.*

<sup>5</sup> Burns v. The Bellefontaine Railway Co. of St. Louis, 50 Mo. 139.

<sup>6</sup> Burns v. The Bellefontaine Railway Co. of St. Louis, 50 Mo. 139.

it is there intimated that if the statute were applicable as a defense at all, then it should be pleaded;<sup>1</sup> and no doubt such is the law.

**5. Ordinary, or common law, liability and duties.**—For injuries occasioned by negligence, street railway companies are liable, as others are, upon common law principles, and no more so.<sup>2</sup>

In actions against such companies for personal injuries caused by the cars leaving the track, the burden of proof is on the company to show that there was no fault or want of care on its part.<sup>3</sup>

If the driver of a car has authority to collect fare, and to expel passengers for non-payment, his master is liable if excessive force and violence is used in so doing; or if, as driver, he negligently keeps the car in motion, by reason of which the expelled person is run over and injured.<sup>4</sup> And while assisting persons on and off the car, if the driver cause an injury by his negligence, the company is liable;<sup>5</sup> and so if he direct children to get upon the front platform, and suddenly start the car so as to injure them.<sup>6</sup>

At common law, the mere act of getting upon the front platform of a street railway car as a passenger, instead of remaining inside the car, will not, without more, be attributed to a party, by the court, as negligence in law, or legal negligence, and therefore contributory to an injury received by a passenger occupying such a position upon the car.<sup>7</sup> And the law is the same as to getting upon the car while in motion.<sup>8</sup> Contributive

<sup>1</sup> *Burns v. The Bellefontaine Railway Co. of St. Louis*, 50 Mo. 139.

<sup>2</sup> *Louisville & Portland R. R. Co. v. Smith*, 2 Duvall, 556, 558.

<sup>3</sup> *Louisville & Portland R. R. Co. v. Smith*, 2 Duvall, 556; *Stokes v. Saltonstall*, 13 Pet. 193.

<sup>4</sup> *Healey v. City Passenger R. R. Co.*, 28 Ohio St. 23, 14 Am. Ry. Rep. 63.

<sup>5</sup> *Drew v. Sixth Ave. R. R. Co.*, 26 N. Y. 49.

<sup>6</sup> *Maher v. Central Park, N. & E. River R. R. Co.*, 67 N. Y. 52, 15 Am. Ry. Rep. 293; *Brennan v. Fair*

*Haven & Westville R. R. Co.*, 45 Conn. 284, 17 Am. Ry. Rep. 263. And see this rule applied to an adult getting upon the car while in motion: *Eppendorf v. Brooklyn City & Newtown R. R. Co.*, 69 N. Y. 195, 18 Am. Ry. Rep. 97.

<sup>7</sup> *Burns v. The Bellefontaine Railway Co. of St. Louis*, 50 Mo. 139; *Mettlestadt v. Ninth Av. R. R. Co.*, 32 Howard's Pr. 428; *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230, 6 Am. Ry. Rep. 198.

<sup>8</sup> *Eppendorf v. B. C. & N. R. R. Co.*, *supra*.



negligence is not to be presumed from such circumstances alone.<sup>1</sup>

If a passenger be accidentally thrown, or falls, from a street car, without any negligence of the company, yet if it is in the power of the driver to save him from injury by stopping the car, it is his duty to do so, and the omission of such duty is such negligence as will render the company liable, if by reason thereof injury ensue to the passenger.<sup>2</sup>

If a street car, in stopping, obstruct a crossing, it is not an unlawful act or a trespass for one seeking to cross to step on the platform of the car for that purpose;<sup>3</sup> and if, while thus lawfully on the car, he is thrown off by the driver, the company will be liable.<sup>4</sup>

Negligence is not imputable to children of such tender years as to be incapable of observing ordinary care;<sup>5</sup> and to allow such infant to ride upon the front platform of a street railway car is negligence, for which the company owning the car will be held accountable.<sup>6</sup> And if children of tender years are thus

<sup>1</sup> *Burns v. The Bellefontaine Railway Co. of St. Louis*, 50 Mo. 139; *Spooner v. Brooklyn City R. R. Co.*, *supra*; *Eppendorf v. B. C. & N. R. R. Co.*, *supra*.

<sup>2</sup> *Chi. West Div. R. W. Co. v. Hughes*, 69 Ill. 170. And proof of negligence of this character is admissible under an averment that "the defendants so negligently managed the car as to run it upon and over plaintiff": *Brennan v. Fair Haven & Westville R. R. Co.*, 45 Conn. 284, 17 Am. Ry. Rep. 263.

<sup>3</sup> *Shea v. Sixth Ave. R. R. Co.*, 62 N.Y. 180, 12 Am. Ry. Rep. 154. And even if a plaintiff is to be regarded as a trespasser, that will not defeat his right of action for negligence: *Brennan v. Fair Haven & Westville R. R. Co.*, 45 Conn. 284, 17 Am. Ry. Rep. 263; *Hicks v. Pacific R. R. Co.*, 64 Mo. 430, 17 Am. Ry. Rep. 273.

<sup>4</sup> *Shea v. Sixth Ave. R. R. Co.*, *supra*.

<sup>5</sup> *Pitts., Allegh. & Manchester Pass. R. W. Co. v. Caldwell*, 74 Penn. St. 421; *East Saginaw City Ry. Co. v. Bohn*,

27 Mich. 503, 10 Am. Ry. Rep. 309; *Balt. City Pass. Ry. Co. v. McDonnell*, 43 Md. 534; *Weick v. Lander*, 75 Ill. 93; *Chi. & Alton R. R. Co. v. Becker*, 76 Ill. 25; S. C. 84 Ill. 483; *Rockford, Rock Island & St. Louis R. R. Co. v. Delaney*, 82 Ill. 198; *O'Flaherty v. Union Ry. Co.*, 45 Mo. 70; *Donoho v. Vulcan Iron Works*, 7 Mo. App. 447; *Walters v. Chi., R. I. & P. Ry. Co.*, 41 Ia. 71; S. C. 36 Ia. 458; *Govt. Str. R. R. Co. v. Hanlon*, 53 Ala. 70; *Haycroft v. Lake Shore & Mich. Southern Ry. Co.*, 2 Hun, 489; S. C. 64 N. Y. 636; *Casey v. N. Y. Cent. & H. R. R. Co.*, 6 Abb. N. C. 104; S. C. 78 N. Y. 518.

<sup>6</sup> *Pitts., Allegh. & Manchester Pass. R. W. Co. v. Caldwell*, 74 Penn. St. 421; *East Saginaw City Ry. Co. v. Bohn*, *supra*; *Maher v. Central Park, N. & E. River R. R. Co.*, 67 N. Y. 52, 15 Am. Ry. Rep. 293. And under such circumstances, negligence will not be imputed to the parent in permitting the child to ride on the street car without escort: *East Saginaw City Ry. Co. v. Bohn*, *supra*.

found upon the platform, it is the duty of the driver to cause them to enter into the car; and if they will not, he should then stop and put them off in safety.<sup>1</sup> In the case here cited from 74 Penn. St., the court say: "Under no circumstances should they permit children to get on and off the front platform of a street car, much less to ride in a place of so much danger to life and limbs. If they do, negligence is imputable to the company, and it will be held responsible for any injury occasioned thereby."<sup>2</sup>

A street railroad company obligating itself to keep in repair a street or streets, or portions of streets used by it for its railway, undertakes to perform said duty to the same extent that performance thereof rests upon the municipal corporation by law, to whom the obligation of the railway company is given.<sup>3</sup> In default of discharging its obligation in that respect, the railroad company is not only liable to a person injured by reason of defects in the street, to the same extent as the municipal corporation would have been if no such undertaking had been incurred by the railroad company, but in case of a recovery against the municipality for such injuries, the railroad company are liable over for the amount thereof.<sup>4</sup>

The degree of care due from a railroad corporation to its passengers is different from what is due to the general public. To the latter, only ordinary care is due, except, perhaps, under special circumstances; but to its passengers the company are bound to the highest degree of care, and utmost prudence to prevent their injury.<sup>5</sup>

<sup>1</sup> *Pittsburg, A. & M. P. Ry. Co. v. Caldwell, and East Saginaw City Ry. Co. v. Bohn, supra*; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 Conn. 284, 17 Am. Ry. Rep. 263.

<sup>2</sup> 74 Penn. St. 425. And see *Maher v. Central Park, N. & E. R. R. Co.*, *supra*. But street car companies are not bound to supply contrivances to prevent children from jumping on their moving cars: *Hestonville Pass. Ry. Co. v. Connell*, 88 Penn. St. 520.

<sup>3</sup> *City of Brooklyn v. The Brooklyn City R. R. Co.*, 47 N. Y. (2 Sickels), 475; *Mayor, etc., of Troy v. Troy & Lansingburgh R. R. Co.*, 3 Lansing,

270.

<sup>4</sup> *Mayor, etc., of Troy v. Troy & Lansingburgh R. R. Co.*, 3 Lansing, 270; *City of Brooklyn v. The Brooklyn City R. R. Co.*, 47 N. Y. 457; *McMahon v. Second Ave. R. R. Co.*, 75 N. Y. 231; S. C. 11 Hun, 347; *Lowery v. Brooklyn City & N. R. R. Co.*, 76 N. Y. 28.

<sup>5</sup> *Pendleton Street R. R. Co. v. Shires & Shires*, 18 Ohio St. 255. As to what facts constitute negligence, in a case of injury to a child by running over her, see *Citizen's Street Ry. Co. v. Carey*, 56 Ind. 396, 18 Am Ry. Rep. 126. In such case, it is not the duty of

The Act of Assembly of the state of Missouri, approved January 16, 1860, in reference to street railroads in the city of St. Louis, declares that "said railroad companies shall not be liable for injuries occasioned by the getting off or on the cars at the front or forward end of the car." Under this statute it held that no recovery could be had by one injured in getting on or off the car at the front, although some negligence of the company, or its agent in charge of the car, contribute to cause the injury;<sup>1</sup> but that for an injury occasioned by negligently starting the car, while one attempting to get off at the front, and having fallen under it, was yet under the car, it being an independent act of negligence, the company might be liable, as raising a question as to the competency or fitness of the servant for his place.<sup>2</sup> This latter question would, of course, involve the questions of knowledge of unfitness, if unfit, and of care in selecting the servant; and also that of contributive negligence on the part of the person injured.

In the operating of a street railway with cars drawn by horses, the same degree of care is not required in law as in the running of cars drawn by steam upon ordinary railroads;<sup>3</sup> the degree of care really incumbent upon the street car company is the same as is required of persons driving ordinary vehicles drawn by horses.<sup>4</sup> Street railways are not, in the popular sense, public highways, and though in a public highway, their tracks are not common, as a public highway, to all persons, but are for the exclusive use of the company owning them, when required by their passing cars.<sup>5</sup>

the driver to stop upon noticing a child standing near the track, while he is yet some distance from her, nor is it his duty to drive the team at a walk: *Ibid.* But see *Farris v. Cass Ave. & F. G. Ry. Co.*, 8 Mo. App. 589; *S. C. 1 Am. & Eng. R. R. Cas.* 622, where negligence was imputed to the railroad company under a nearly similar state of facts. In *Phil. City Pass. Ry. Co. v. Henrice*, 92 Penn. St. 431; *S. C. 37 Leg. Int.* 135, 9 Repr. 689, it is held that the question of negligence in omitting to stop the car in such case is for the jury.

<sup>1</sup> *McKeon v. Citizens R. W. Co.*, 42 Mo. 79.

<sup>2</sup> *McKeon v. Citizens R. W. Co.*, 42 Mo. 79. And see *Healey v. City Passenger R. R. Co.*, 28 Ohio St. 23, 14 Am. Ry. Rep. 63.

<sup>3</sup> *Unger v. The Forty-Second Street & Grand Street Ferry R. W. Co.*, 51 N. Y. (6 Sickels), 497.

<sup>4</sup> *Unger v. The Forty-Second Street & Grand Street Ferry R. W. Co.*, 51 N. Y. 497; *Pendleton Str. R. R. Co. v. Shires*, *supra*; *Same v. Stallmann*, 22 Ohio St. 19.

<sup>5</sup> *Whitaker v. The Eighth Avenue*

Although the peculiar character of street railways, employed and running through crowded thoroughfares of cities and towns, makes it incumbent on the company to exercise the utmost care and diligence to avoid collisions and the infliction of injuries,<sup>1</sup> yet this rule, and the enforcement thereof, does not dispense with the care and prudence required of all persons using the street in common with the railway company;<sup>2</sup> and if one omit such care and diligence on his part, and thereby contributes to the bringing upon himself an injury from such railway, or the cars thereof, he can not maintain an action therefor.<sup>3</sup>

Though a passenger on a street car is riding free, by invitation of the conductor, driver, or other person in control thereof, he is nevertheless entitled to ordinary care to avoid his injury; and if, through the negligence of the company, or of those in charge of the car, he be injured, and do not by any negligence or fault of his own contribute to bring about such injury, he will be entitled to recover compensation therefor.<sup>4</sup>

But for a passenger to attempt to get off a street car while the same is moving along, and without inducement from those in

R. R. Co., 51 N. Y. (6 Sickels), 295. And such roads are not subject to the ordinary or statute law of the road, or to statutory liabilities created for ordinary roads: *Ib.*

<sup>1</sup> *Liddy v. St. Louis R. R. Co.*, 40 Mo. 506; *Meyer v. Lindell Ry. Co.*, 6 Mo. App. 27; *Adolph v. Cent. Park, N. & E. River R. R. Co.*, 33 N. Y. Superior, 186, 43 *Id.* 199, 65 N. Y. 554, 76 N. Y. 530.

<sup>2</sup> *Liddy v. St. Louis R. R. Co.*, 40 Mo. 506.

<sup>3</sup> *Liddy v. St. Louis R. R. Co.*, 40 Mo. 506. And see *Coulter v. Am. Merch. Un. Exp. Co.*, 56 N. Y. 585; *Dyer v. Erie Ry. Co.*, 71 N. Y. 228; *Voak v. Northern Cent. Ry. Co.*, 75 N. Y. 320; *Cuyler v. Decker*, 20 Hun, 173; *Indianapolis & St. Louis R. R. Co. v. Stout*, 53 Ind. 143; *Penn. R. R. Co. v. Werner*, 89 Penn. St. 59; *Government Str. R. R. Co. v. Hanlon*, 53 Ala. 70; *Chicago & Alton R. R. Co. v. Becker*, 76 Ill. 25. But where, by the negli-

gence of the driver of a car, a passenger is placed in peril, as by driving upon a railroad crossing when an approaching train is dangerously near, and he is compelled to choose between two hazards, and he acts as a person of ordinary prudence would in the same situation, and jumps from the car, and injury results therefrom, he is not guilty of contributory negligence, even though it appear that if he had acted otherwise he would have escaped injury: *Twomley v. Central Park, N. & E. River R. R. Co.*, 69 N. Y. 158, 18 Am. Ry. Rep. 113. In such case, evidence of the action of other passengers is competent as part of the *res gestæ*, and as evidence of what was ordinary prudence under the circumstances: *Ibid.*

<sup>4</sup> *Wilton v. The Middlesex R. R. Co.*, 107 Mass. 108; *Brennan v. Fair Haven & Westville R. R. Co.*, 45 Conn. 284, 17 Am. Ry. Rep. 263.

charge thereof, is such negligence as will preclude a recovery for any injury he may receive in so doing.<sup>1</sup>

The rule in reference to expelling disorderly persons from railway cars is not different as to street railways from what it is in regard to railroads generally. Carriers of passengers are not only authorized, but are bound, to furnish their passengers with orderly, safe and comfortable passage, and may, by their conductors, or persons in charge, expel the disorderly, and repress and prohibit all rudeness, indecency, impropriety or disturbance, whether of word or deed; nor is there any obligation to wait until an overt act of violence, profanity, or other disorderly conduct, is committed, to the annoyance of orderly passengers, before expelling offenders who become such by indicating a disposition to commit disorderly acts.<sup>2</sup>

**6. Unlawful imposition of burdens on street railways.**—The grant to a street railway company, by a municipal government, of the franchise or right of laying and operating a street railway in the streets of a city, confers in itself a right to do so, upon the grantee, as against the city, and is in that respect a license in

<sup>1</sup> *Nichols v. The Middlesex R. R. Co.*, 106 Mass. 463; *Dickson v. Broadway & 7th Ave. R. R. Co.*, 1 Jones & Spencer (N. Y.), 330; *Chicago West Div. Ry. Co. v. Mills*, 91 Ill. 39. But see *Eppendorf v. Brooklyn City & Newtown R. R. Co.*, 69 N. Y. 195, 18 Am. Ry. Rep. 97. In this case it is held that it is not always, and under all circumstances, negligence to get upon a street car in motion; and it is accounted to be legal negligence only in exceptional cases, and under unfavorable conditions. Ordinarily, it is a question of fact for the jury: *Ibid.* In this case plaintiff signaled the car, and the driver applied the brake. The car was an open one, with a step along the side. While the car was still moving, the plaintiff attempted to get on, when the driver let go the brake and started the car with a jerk, throwing plaintiff under the car; and it was held the evidence should have been submitted to the jury, and a nonsuit was prop-

erly denied. Evidence that plaintiff was in the habit of so jumping on the cars while in motion was held inadmissible: *Ibid.*

<sup>2</sup> *Vinton v. Middlesex R. R. Co.*, 11 Allen, 304; *Murphy v. Union Ry. Co.*, 118 Mass. 228, 9 Am. Ry. Rep. 282; *Lemont v. Washington & Georgetown R. R. Co.*, 1 Mackey (D. C.), 180; S. C. 1 Am. & Eng. R. R. Cas. 263; The question whether the expulsion was properly and considerably done, is for the jury: *Murphy v. Union Ry. Co.*, *supra*; *Healey v. City Passenger R. R. Co.*, 28 Ohio St. 23, 14 Am. Ry. Rep. 63. It does not affect the question that the passenger is sick, or that his misconduct is not willful or voluntary, if he is honestly supposed to be intoxicated. The rule applicable to the treatment of sick persons on steam cars does not necessarily apply to horse cars: *Lemont v. W. & G. R. R. Co.*, *supra*.

itself, and is in the nature of a contract, which precludes the subsequent imposition of pecuniary terms upon the grantee for its enjoyment, under the pretense of a license. The right so granted is subject in its exercise only to the police regulations of the municipal government; and an ordinance imposing an annual license upon its use is not such, but is a mere arbitrary money imposition or exaction annexed to the enjoyment of the grant, and impairs the contract thereof, and is in that respect unauthorized and void.<sup>1</sup> And so likewise, in New Jersey, the same ruling exists. It is held there that a municipal government may not impose upon a street railway company, who already have the right to operate their road, a license for the enjoyment of its own rights; and that a penal statute imposing upon the company a fine or penalty for so operating without the required license, is void.<sup>2</sup> It is also held that subsequent ordinances varying the terms of the original restrictions and limitations contained in the charter, and rendering them more onerous, are invalid.<sup>3</sup> Subsequent ordinances enacting such impositions are prospective only in their action, and confined to subsequent corporations.<sup>4</sup>

But a bonus or consideration for the grant may be required in making it; thus, while it is not inconsistent with the purpose of a public street that the city authorities allow the construction and use of street railways therein, where power is given by law to control that subject, yet it is a legitimate and rightful exercise of such power, on the part of such municipality, to impose upon the company obtaining the grant, as part of the terms

<sup>1</sup> Mayor, etc., of New York *v.* Second Avenue R. R. Co., 32 N. Y. (5 Tiffany), 261; Same *v.* Third Avenue R. R. Co., 33 N. Y. (6 Tiffany), 42. See State *v.* Jersey City, 5 Dutch. 170; City of Chicago *v.* Sheldon, 9 Wall. 50; Ill. Cent. R. R. Co. *v.* City of Bloomington, 76 Ill. 447; City of Des Moines *v.* Chi., R. I. & Pac. Ry. Co., 41 Ia. 569. Such license being illegal, any penalty imposed for its enforcement is also illegal, and though penal in its nature, is not a police regulation, but a mere unauthorized money imposition: N. Y. *v.* 2d Ave. R. R. Co.,

and Same *v.* 3d Ave. R. R. Co., *supra*.

<sup>2</sup> The State of New Jersey, Hoboken & Weehawken Horse R. R. Co., prosecutors, *v.* The Mayor & Council of the City of Hoboken, 1 Vroom (N. J.), 225.

<sup>3</sup> The State of New Jersey, Hoboken & Weehawken Horse R. R. Co., prosecutors, *v.* The Mayor & Council of the City of Hoboken, 1 Vroom (N. J.), 225.

<sup>4</sup> The State of New Jersey, Hoboken & Weehawken Horse R. R. Co., prosecutors, *v.* The Mayor & Council of the City of Hoboken, *supra*.

thereof, the payment of a bonus as a consideration for the same; and any agreement of the company to pay the same, or the acceptance and exercise of the grant originally made upon the terms of such bonus, will be enforced in law.<sup>1</sup>

Where, in a grant of a right of way by a municipal corporation to a street railway company in the streets of a city, it is made the duty of the city surveyor to furnish the company with the lines and levels for the building of the road, then if he refuses so to do, a writ of mandamus lies to compel its performance.<sup>2</sup> And though the grant be at first of questionable validity, yet the city, by the passage of subsequent ordinances recognizing its existence, and by receiving payment of the bonus stipulated for as a consideration for the right, is estopped to deny the validity of the grant, or the right of the company to enjoy the same. Such subsequent action of the city amounts to a ratification of the original grant, and is curative thereof.<sup>3</sup>

**7. Police regulation of.**—The grant to a street railway company of the right to construct a railway in, and to carry passengers on, over and upon the streets of a city or other municipality, does not exempt the company from subjection to the reasonable police regulations of such municipality.<sup>4</sup> Such corporations are subject to the same regulations that a private person would be subject to under like circumstances.<sup>5</sup> And, therefore, where there is a general power to grant licenses of business in the city authorities, they may legally impose on such street railway company the payment of an annual license for the exercise of the privilege; for in respect to such grant, and the exercise of the privileges conferred, such corporations are to be regarded as inhabitants of the city or other municipality.<sup>6</sup>

<sup>1</sup> Covington Street R. W. Co. v. City of Covington, 9 Bush, 127.

<sup>2</sup> The State, *ex rel.* St. Charles R. Co., v. Cockrem, 25 La. An. 356.

<sup>3</sup> The State, *ex rel.* St. Charles R. Co., v. Cockrem, 25 La. An. 356. Where the right to amend the charter is reserved, the legislature may authorize another company to lease the tracks of the first, upon making reasonable compensation; but not for loss of profits arising from maintaining the

second company: Metropolitan R. R. Co. v. Highland St. Ry. Co., 118 Mass. 290, 9 Am. Ry. Rep. 285.

<sup>4</sup> Frankford & Phila. Passenger R. W. Co. v. City of Phila., 58 Penn. St. 119.

<sup>5</sup> Frankford & Phila. Passenger R. W. Co. v. City of Phila., 58 Penn. St. 119.

<sup>6</sup> Frankford & Phila. Passenger R. W. Co. v. City of Phila., 58 Penn. St. 119. In this case, the case of the City of

A statute provision that a passenger may become, upon paying a certain sum in addition to the regular fare, entitled to passage on the same day between any two points in the city, without further payment, "for both of the passages aforesaid," entitles the passenger so paying to but two and no more passages.<sup>1</sup>

Where, by the law under which the grant of the right of way in the streets of a city is made to a street railroad company, there is reserved to the city the right to regulate and control the same in its construction and reconstruction, the city authorities may require the railway company to change the character or kind of rails used upon its road, when the public necessities demand it as a matter of conformity to altered improvements of the streets;<sup>2</sup> and when the public good requires such alteration of street improvements as necessarily result in a change of rail by the street railway company, the charter rights and grant of the right of way of the company are no answer to such requisition, for it is not in the power of the municipal authorities to barter away, or dispose of by contract, actual or implied, any of its legitimate legislative powers that are required to be exercised for the general good.<sup>3</sup> And if, in the progress of such needed improvements, the railroad company refuse to temporarily remove its works when in the way thereof, the city authorities may remove the same, and are not bound to replace them; and no action lies therefor, if not done in an improper manner.<sup>4</sup>

In Pennsylvania, where, by law, a special remedy is provided, and the punishment defined, for the obstruction of public cross-

New York *v.* Second Ave. R. R. Co., 32 N. Y. 261, is referred to and disregarded, as not only in some respects different, as alleged, from the one at bar, but also on the ground that the municipal powers of the city of New York are regarded as less than those of Philadelphia. Under an act providing for the payment of a tax or duty upon all sums received or charged for the hire, fare or conveyance of passengers, it was held the Crown was entitled to duty on the whole amount received from passengers, even though it exceeded the maximum charge allowed by law; and so were entitled to duty on an extra charge made to, and col-

lected of, passengers, to cover this very tax: *Atty. Genl. v. London & North Western Ry. Co.*, Law Rep. 6 Q. B. Div. 216; S. C. 1 Am. & Eng. R. R. Cas. 578. Duty was also allowed on fares received on sleeping cars, and for the extra accommodations thereon: *Ibid.*

<sup>1</sup> *Wakefield v. South Boston R. R. Co.*, 117 Mass. 544, 6 Am. Ry. Rep. 238.

<sup>2</sup> *Louisville City R. W. Co. v. The City of Louisville*, 8 Bush (Ky.), 415.

<sup>3</sup> *Louisville City R. W. Co. v. The City of Louisville*, 8 Bush (Ky.), 415.

<sup>4</sup> *Louisville City R. W. Co. v. The City of Louisville*, 8 Bush (Ky.), 415.



ings by street railways, an indictment at common law will not lie against the company for the same, although the act complained of be such as, in the absence of such special provision, would amount to a nuisance.<sup>1</sup>

<sup>1</sup>*Brown v. Commonwealth*, 3 S. & R. 275; *Commonwealth v. Evans*, 13 S. & R. 426; *Garman v. Gamble*, 10 Watts, 382; *McElhiney v. Commonwealth*, 22 Penn. St. (10 Harris), 365; *Penn. R. R. Co. v. Kelly*, 31 Penn. St. (7 Casey), 372; *Commonwealth v. Capp*, 48 Penn. St. (12 Wright), 53.

## CHAPTER LXIV.

### LIMITATION OF ACTIONS AGAINST RAILROAD COMPANIES.

	Section.		Section.
In actions and proceedings about taking right of way . . .	1	ital stock . . . . .	5
In actions for injuries to live stock . . .	2	In actions against foreign corporations . . . . .	6
In actions for injuries to employes . . . . .	3	In actions on subscriptions to capital stock . . . . .	7
In actions for personal injuries resulting in death . . . .	4	In actions for statute penalties . . .	8
In actions for dividends of cap-		When limitation begins to run . . .	9

**1. In actions and proceedings about taking right of way.**—In Pennsylvania the ruling originally was, that the statute of limitations was a bar to proceedings to assess damages for lands, or an easement over lands, taken by a railroad corporation for its right of way. Though not within the language of the statute, the court recognized in the cases the same principle of analogy that is applied to cases in chancery in reference to the limitations of the statute, and applied the statute to the case as one analogous to those provided for, although not expressly mentioned therein.<sup>1</sup> In the case here cited, the award of the viewers was appealed from by the railroad company, and the plea of limitations pleaded—“*actio non accrevit infra sex annos.*” The court below charged the jury sustaining the plea in law, and the supreme court affirmed the ruling. But by subsequent ruling in that state a contrary doctrine is established, and the case here cited of *Forster v. The Cumberland Valley Railroad Company* is referred to as not decided on the broad principle as to the bar of the statute in cases of pure assessment of damages for right of way, but that the case was virtually one in trespass in its character, which action was especially included in the statute. By this subsequent ruling it is held,

<sup>1</sup> *Forster v. The Cumberland Valley R. R. Co.*, 23 Penn. St. (11 Harris), 371.

that under the statute of limitations of that state, which limits the commencement of the several common law actions, by name, to a special time after the right of action accrues, that the proceeding under the statute to assess damages or compensation for lands, or an easement in lands, for a right of way, is not within the meaning of the statute, and is not affected thereby.<sup>1</sup> The supreme court of that state say, the learned Ch. J. THOMPSON: "I think it is not susceptible of doubt that the legislature meant only to limit suits and actions known to common law proceedings or forms of action. The case we are now considering is a statutory proceeding exclusively, although common law forms may be used in the process of the pleadings on appeal."<sup>2</sup> \* \* \* "In *Forster v. The Cumberland Valley Railroad Co.*, the statute of limitations was extended to a case of assessment of damages, under an Act of the 2d of April, 1831, to incorporate the Cumberland Valley Railroad Company. This point of the case was not sustained by authority, but was rested on the ground, that as the land taken was taken without compensation first made, it was a trespass, and the proceeding was essentially an action of trespass. There may have been peculiarities about the case, and we do not say but that it was well decided, but the principle has not been followed in this state as a rule in any other cases of assessment of damages for taking property."<sup>3</sup>

In Maine, actions on judgments of county commissioner's courts are barred by limitation in six years. There being such a judgment for damages for a right of way remaining unpaid for over six years, an injunction was applied for to restrain the company for running its train over the ground thus taken and not paid for, and the right to the injunction was predicated on the non-payment of the judgment. The injunction was denied, on the ground that the demand was barred by the statute.<sup>4</sup>

<sup>1</sup> Delaware, *Lackawanna & W. R. R. Co. v. Burson*, 61 Penn. St. 369; *McClinton v. Pittsburg, Ft. Wayne & Chi. Ry. Co.*, 66 Penn. St. 404. And see *Jefferson & Lake Pontchartrain R. R. Co. v. City of New Orleans*, 31 La. Ann. 478; *Flagg v. City of Worcester*, 13 Gray, 601; *Erskine v. City of Boston*, 14 Gray, 216; *Revere v. Same*, *Id.* 218.

<sup>2</sup> Delaware, *Lackawanna & W. R. R. Co. v. Burson*, 61 Penn. St. 378.

<sup>3</sup> Delaware, *Lackawanna & W. R. R. Co. v. Burson*, 61 Penn. St. 369, 378.

<sup>4</sup> *Mooers v. The Kennebec & Portland R. R. Co.*, 58 Maine, 279. But in Wisconsin, in a similar proceeding, the supreme court of that state hold that the right to maintain such action is "founded upon the title to real

In North Carolina the action must be brought within two years from the completion of the road; and the fact that the railroad company, before the expiration of the two years, had instituted proceedings for condemnation, which were subsequently dismissed "without prejudice" to the owners, did not prevent the statute from running.<sup>1</sup>

An obligation of a railroad company to build a bridge over right-of-way grounds granted, at such place as the grantor shall designate, implies that, as a condition precedent to performance by the company, the grantor will, in a reasonable time, point out the place or locality at which it is to be built. If this be not done for twenty years, specific performance will not be decreed against the company; but will be denied by reason of the grantor's *laches* in not pointing out the place for its erection, and sooner claiming performance of the company.<sup>2</sup>

**2. In actions for injuries to live stock.**—Actions for damages for injuries to live stock are not in the nature of penal actions, whether for single or for double damages;<sup>3</sup> and as a sequence thereto, they are not barred by the statute of limitations in regard to suits for penalties. Such actions are simply actions for injuries to personal property, and though in some cases the measure of damages are fixed by statute as double the value of the injury, this is not by way of penalty, but is for compensation to the injured party.<sup>4</sup> It is the ordinary and general statute of limitation that is to be applied to these actions, whatever that be, in the several states wherein they occur.<sup>5</sup> In Iowa their limitation is five years after the action accrues;<sup>6</sup> and the statute begins to run from the time of inflicting the injury, as well when the suit is for double as for single damages;

property," within Sec. 3, Ch. 138, R. S., and the limitation is therefore twenty years; neither Secs. 6 nor 22 of that chapter have any application. And they further hold that a delay of fifteen years did not constitute a waiver: *Gilman v. Sheboygan & Fond du Lac R. R. Co.*, 40 Wis. 653, 13 Am. Ry. Rep. 468.

<sup>1</sup> *Vinson v. N. Car. R. R. Co.*, 74 N. Car. 510, 13 Am. Ry. Rep. 396.

<sup>2</sup> *Williams v. Hart*, 116 Mass. 513.

<sup>3</sup> *Koons v. Chicago & Northwestern Ry. Co.*, 23 Iowa, 493; *Corning v. McCullough*, 1 Comst. 66; *Jeffersonville R. R. Co. v. Gabbert*, 25 Ind. 431.

<sup>4</sup> *Koons v. Chicago & Northwestern Ry. Co.*, 23 Iowa, 493; *Jeffersonville R. R. Co. v. Gabbert*, 25 Ind. 431.

<sup>5</sup> *Koons v. The Chicago & Northwestern Ry. Co.*, 23 Iowa, 493.

<sup>6</sup> *Koons v. The Chicago and Northwestern Ry. Co.*, 23 Iowa, 493.

and not, if in the latter case, from service of the notice of the injury under the statute allowing double damages. The action has accrued before, and the notice affects only the measure of recovery, and not the right thereof.<sup>1</sup>

**3. In actions for personal injuries to employes.**—If the action be for a common law right of action, as, for instance, for an injury occasioned by the negligence of the principal, then the ordinary general statute of limitations of actions for personal injuries will apply; but where the right of action involved is statutory, as in cases arising under the statute for injuries caused to an employe by the negligence of a co-employe, then the time of limitation, if any, is that given in the statute giving the right of action, if there be a limit therein, and if no limitation therein, then the limitation will be governed by the general statute of limitations, if broad enough to cover the case. In Iowa, the limitation is two years, and is now fixed by the code, but originally by the statute which conferred the right of action.<sup>2</sup>

An indictment, under the statute, against a railroad corporation for causing the death of a person who is a passenger, is not affected by the statute of limitations of Massachusetts in regard to "actions and suits for any penalty or forfeiture, on any penal statute, brought by any person."<sup>3</sup> And though by statute of 1853, ch. 414, the prosecution, by an indictment against a railroad company for loss of life in said state, is limited to one year from the time of the injury causing the death, yet such latter statute is no bar to indictments found before it went into operation.<sup>4</sup>

In Indiana, the limitation in actions under the statute for the death of a person is two years, reckoning from the time of the death.<sup>5</sup> In Connecticut, the civil action given by statute for the wrongful death of a person, accrues at the death, but the limitation does not begin to run until letters of administration or testamentary have been issued on the decedent's estate.<sup>6</sup>

<sup>1</sup> *Koons v. The Chicago & Northwestern Ry. Co.*, 23 Iowa, 493.

<sup>2</sup> Code of 1873, 432, sec. 2529.

<sup>3</sup> *Commonwealth v. Boston & Worcester R. R. Co.*, 11 Cush. 512, 515.

<sup>4</sup> *Commonwealth v. Boston & Worcester R. R. Co.*, 11 Cush. 512, 516.

<sup>5</sup> *Hanna v. The Jeffersonville R. R.*

*Co.*, 32 Ind. 113; *Pittsburgh, Fort Wayne & Chicago Ry. Co. v. Vining's Adm'r*, 27 Ind. 513.

<sup>6</sup> *Andrews v. Hartford & N. Haven R. R. Co.*, 34 Conn. 57. And see *Sherman v. Western Stage Co.*, 24 Ia. 515.

In Alabama, the limitation is one year, and begins to run from the day of the death.<sup>1</sup> In Iowa, the limitation is two years,<sup>2</sup> and runs from the time the action accrues, which is, from the date of the injury.<sup>3</sup>

**5. In actions for dividends of capital stock.**—The rule laid down in Pennsylvania is, that the statute of limitations does not run against a claim for dividends of capital stock until after demand made and refusal to pay, or notice to the shareholder that his right to dividends is denied.<sup>4</sup> The Supreme Court of that state say, WOODWARD, J.: "It may well be doubted whether under our acts of assembly any incorporated company can set up the statute of limitations against a stockholder's dividends. It certainly can not be done until after a demand and refusal, or notice to a shareholder that his right to dividends is denied."<sup>5</sup> To our mind, the company do not stand in the character of an ordinary debtor, as to dividends declared and unpaid, but rather in the position of a trustee, who is not liable to suit before demand, and against whom the statute does not run.

**6. In actions against foreign corporations.**—To a plea of the statute of limitations put in by a corporation when sued in a different state than that wherein it legally exists, a replication is good that avers the defendant to be a foreign corporation, existing in, and organized under the laws of, a different state than the one wherein the suit is pending.<sup>6</sup> Such corporation can not transfer or carry its corporate capacity into a different state than that wherein it is created.<sup>7</sup> But it may do business in another state;<sup>8</sup> and if, for such purpose, it has agencies therein,

<sup>1</sup> Selma, Rome & Dalton R. R. Co. v. Lacey, 49 Geo. 106.

<sup>2</sup> Code of 1873, sec. 2527, 2529.

<sup>3</sup> Code of 1873, sec. 2527, page 431.

<sup>4</sup> Phila., Wilmington & Baltimore R. Co. v. Cowell, 28 Penn. St. (4 Casey), 329, 339.

<sup>5</sup> Phila., Wilmington & Baltimore R. R. Co. v. Cowell, *supra*.

<sup>6</sup> North Mo. R. R. Co. v. Akers, 4 Kansas, 453, 475; Olcott v. The Tioga R. R. Co., 20 N. Y. 210; Thompson v. The Tioga R. R. Co., 36 Barb., 79;

Blossburg & Corning R. R. Co. v. The Tioga R. R. Co., 5 Blatch. (U. S. C. C.), 387.

<sup>7</sup> Bank of Augusta v. Earle, 13 Pet. 568; Paul v. Com. of Va., 8 Wall. 168.

<sup>8</sup> Bank of Augusta v. Earle, 13 Pet. 568; Christian Union v. Yount, 101 U. S. 352; Black v. Del. & R. Canal Co., 7 C. E. Green, 130, 422; S. C. 9 *Id.* 455; O'Brien v. Wetherell, 14 Kans. 616; Claremont Bridge v. Royce, 42 Vt. 730.

it may be therein sued, if the local laws so provide.<sup>1</sup> But where there is no local law authorizing service on such resident local agent, as for service upon the company personally, proceedings *in rem* only will lie against the foreign corporation.<sup>2</sup>

The ruling in New York is that foreign corporations, that is, corporations of other states of the United States, can not avail themselves of the statute of limitations of New York in a suit against them in that state; that the exception in the statute of persons out of the state, applies as well to corporations of another state as to natural persons absent or residing out of the state, and that therefore the statute does not run against such corporations.<sup>3</sup> And this, too, although they have an agency in New York, and a resident agent there, on whom process in the case may be legally served; and have had, during the time the statute is claimed to have run, and on whom, under the local law of New York, process was servable.<sup>4</sup>

**7. In actions on subscriptions to capital stock.**—A contract of subscription to the capital stock of a railroad corporation is but an ordinary contract to sell and to purchase the stock, and as such, is subject to the statute of limitations.<sup>5</sup> If no steps be taken to enforce payment within the time limited for enforcement of such class of contracts by law, the same will be barred, unless the statute be suspended in its effects by some exception

<sup>1</sup>Baldwin and wife *v.* Miss. & Mo. R. R. Co., 5 Iowa, 519; Richardson *v.* B. & M. R. R. Co., 8 Iowa, 262; Slavens *v.* South Pacific R. R. Co., 51 Mo. 308.

<sup>2</sup>Andrews *v.* Michigan Cent. R. R. Co., 99 Mass. 534; S. C. 1 With. Corp. Cas. 620, 621; Barnett *v.* Chicago & L. H. R. R. Co., 6 Thomp. & C. 358; S. C. 4 Hun, 114; Ogdensburg & L. C. R. R. Co. *v.* Vt. & Can. R. R. Co., 6 Thomp. & C. 489.

<sup>3</sup>Thompson *v.* The Tioga R. R. Co., 36 Barb. 79; Olcott *v.* The Same, 20 N. Y. 210; Rathbun *v.* The Northern Cent. Ry. Co., 50 N. Y. 656; Mallory *v.* Tioga R. R. Co., 3 Abbott's Ct. of Ap. 139; Tioga R. R. Co. *v.* The Blossburg & Corning R. R.

Co., 20 Wall. 137, 143.

<sup>4</sup>Rathbun *v.* The Northern Cent. Ry. Co., 50 N. Y. 656; Tioga R. R. Co. *v.* Blossburg & Corning R. R. Co., 20 Wall. 137, 143, 144, 150. In the case here cited from 20 Wall., the Supreme Court of the United States (Justice Miller dissenting) follow the rulings of New York, and consider the court above bound by them, the case coming up from that state.

<sup>5</sup>Pittsburgh & Connellsville R. R. Co. *v.* Byers, 32 Penn. St. (8 Casey), 22; McCully *v.* Pittsburgh & Connellsville R. R. Co., 32 Penn. St. (8 Casey), 25; Pittsburgh & Connellsville R. R. Co. *v.* Graham, 36 Penn. St. (12 Casey), 77.

known to the law.<sup>1</sup> The means to be resorted to for its enforcement is by calls for assessments; and if no call be made within the time of limitation, the right to call for the same is barred, by analogy to the statute.<sup>2</sup>

Such being the legal status of contracts of subscription to capital stock, it follows therefrom that if the calls be made within the time of limitation, and no suit be commenced for the payments called for within the time of limitation of actions, counting from the time the right of action accrues by the making of the call or calls, then the right of action which accrued to the company by the making of the call or calls is barred.<sup>3</sup>

**8. In actions for statute penalties.**—In Iowa, the limitation of actions for statute penalties is two years; after the expiration of that time the action is barred.<sup>4</sup>

**9. When limitation begins to run.**—Where, by act of assembly granting a subsidy in bonds of a state to a railroad corporation, to aid in or promote the construction of a railroad, a time is limited in which acceptance of the same by the company is to be effected and notice thereof given to the executive, such time begins to run only from the time of publishing the act, and not from the date of its passage, if there be no provision in that respect to the contrary.<sup>5</sup> In such case, the authorities of the state whose duty it is to publish the laws can not deprive the company of the benefit of the act by delay in its publication. Such a construction of the law would enable the mere agents of the state to defeat, in respect to legislation, the expressed will of the legislature.<sup>6</sup>

Where a subscriber to the capital stock of a railroad company himself holds the subscription paper to which he subscribes, then the true date of his subscription is the time of delivery of such paper to the company. Delivery is an essential part of the execution of a written contract, without which there is no

<sup>1</sup> *Pittsburgh & Connellsville R. R. Co. v. Graham*, 36 Penn. St. (12 Casey), 77.

<sup>2</sup> *Pittsburgh & Connellsville R. R. Co. v. Graham*, 36 Penn. St. 77; *P. & C. R. R. Co. v. Byers*, *supra*; *McCully v. P. & C. R. R. Co.*, *supra*.

<sup>3</sup> *P. & C. R. R. Co. v. Graham*, *supra*.

<sup>4</sup> Code of 1873, title "of Limitation of Actions," p. 432, sec. 2529.

<sup>5</sup> *State of Louisiana v. The North Louisiana & Texas R. R. Co.*, 25 La. Ann. 65.

<sup>6</sup> *State of Louisiana v. North Louisiana & Texas R. R. Co.*, 25 La. Ann. 65.



validity.<sup>1</sup> It follows from this principle that the statute of limitations only begins to run, as against a contract of subscription to the capital stock of a railroad company, from the time of delivery of the written contract.<sup>2</sup>

Where, under the laws of Louisiana, the affairs of an insolvent railroad corporation are placed by decree of court in the hands of a liquidator, and he is ordered to collect in the assets, such order is not a money judgment, but is merely a directory judgment or decree, requiring the liquidator to perform a duty resulting from his office—a duty which he might perform without being specially ordered thereto; therefore the statute of said state limiting actions on money judgments to ten years, has no application to, and does not work a prescription to, an action or suit instituted after ten years by such liquidator, to collect in the assets of the corporation, although the proceeding be set on foot in virtue of, and in obedience to, such original order or decree.<sup>3</sup>

Limitation, that is, prescription, of actions *ex delicto*, in Louisiana, is one year.<sup>4</sup> This limitation, or prescription, as termed in said state, applies as well to claims put in by a defendant by way of set-off, but there termed *reconvention*, as to the claim of plaintiff upon which suit be brought.<sup>5</sup> Thus, where suit was brought against a railroad company for damages for killing an animal, and the company set up by way of defense that the killing was occasioned by unavoidable force, and claimed in turn, by way of reconvention, damages from plaintiff for injury caused to the defendant's cars and track by the collision with the animal, to which latter claim plaintiff opposed the plea of one year's prescription; and it appearing that more than one year had intervened between the time of the injury and the making of the claim of reconvention, the court held

<sup>1</sup> Pittsburgh & Connellsville R. R. Co. v. Plummer, 37 Penn. St. (1 Wright), 413; New Hampshire Cent. R. R. Co. v. Johnson, 30 N. H. 390; Corwith v. Culver, 69 Ill. 502.

<sup>2</sup> Pittsburgh & Connellsville R. R. Co. v. Plummer, 37 Penn. St. (1 Wright), 413.

<sup>3</sup> Liquidator of Clinton & Port Hud-

son R. R. Co. v. Whitaker, 22 La. An. 209; Liquidator of Clinton & Port Hudson R. R. Co. v. Lee, 22 La. An. 287.

<sup>4</sup> Harris v. N. Orleans, Opelousas & Great W. R. R. Co., 16 La. An. 140.

<sup>5</sup> Harris v. N. Orleans, Opelousas & G. W. R. R. Co., 16 La. An. 141.

that the claim of reconvention was barred by limitation, and the supreme court affirmed the ruling.<sup>1</sup>

In these cases under the Louisiana civil code, the construction of the courts of that state is that the prescription or limitation begins to run from the date at which the actual injury or damage is sustained. To illustrate the principle, the court suppose the case of undermining a party wall so that it falls at a subsequent date—prescription is calculated from the time of the falling of the wall, and not from the time of committing the act. So, if one secretly saw the beams of a bridge, so that at a subsequent time it falls, and by the fall one is maimed, the time of prescription or limitation is to be calculated from the time at which the damage is incurred. Time is to be calculated from the date of the injuries or fatal result, and not from the time of committing the act that subsequently leads to it.<sup>2</sup>

And so, under said code, in actions *ex contractu*, where a contract liability is made dependent on a contingency, the limitation, or prescription, as there termed, begins to run only from the happening of the contingency fixing the liability; and the prescription or limitation is ten years.<sup>3</sup> Thus, where capital stock of a railroad company becomes payable, by the terms of subscription, upon demand thereof by the company, or the authorities administering the affairs thereof, prescription does not begin to run against the right to collect the same until such demand be made.<sup>4</sup>

Although direct and continuous trusts are not affected by the statute of limitations, yet where the trust is temporary in point of time, as, for instance, the trust arising from the office of railroad director, the trust ceases when the office ceases;<sup>5</sup> therefore the statute of limitations, which commences to run when there is no longer any trust, may be successfully invoked as a defense to actions growing out of the doings of such directors as to the mistaken or other abuse of their trust.<sup>6</sup> If the proceeding

<sup>1</sup> Harris v. N. Orleans, Opelousas & G. W. R. R. Co., 16 La. An. 140.

<sup>2</sup> Mestier v. N. Orleans, Opelousas & Great Western R. R. Co. *et al.*, 16 La. An. 354.

<sup>3</sup> Liquidator of Clinton & Port Hudson R. R. Co. v. Eason and wife, 14 La. An. 828.

<sup>4</sup> Liquidator of Clinton & Port Hudson R. R. Co. v. Eason and wife, 14 La. An. 828.

<sup>5</sup> Lexington & Ohio R. R. Co. v. Bridges, 7 B. Mon. 556, 559, 560.

<sup>6</sup> Lexington & Ohio R. R. Co. v. Bridges, 7 B. Mon. 556, 559, 560.

be in chancery, then the chancellor will apply the limitation to the case by analogy to the statute.<sup>1</sup>

And where an exception to the running of the statute is made in cases of mistakes, it is mistakes only of the injured or complaining party; therefore such an exception will not prevent the running of the statute in favor of a director, when sued for mistakenly declaring a dividend to the injury of creditors.<sup>2</sup> And so they are protected, if in equity, by lapse of time.<sup>3</sup>

<sup>1</sup> Lexington & Ohio R. R. Co. v. Bridges, 7 B. Mon. 556, 561, 562.  
Bridges, 7 B. Mon. 556, 559, 560.

<sup>2</sup> Lexington & Ohio R. R. Co. v.

<sup>3</sup> Lexington & Ohio R. R. Co. v. Bridges, *supra*, and 563.

## CHAPTER LXV.

### SPECIFIC PERFORMANCE.

	Section.		Section.
Will be decreed of contract to convey land for right of way . . . . .	1	sion be contracted for . . . . .	6
Agreement and award to purchase land . . . . .	2	For construction of railroad, will not be decreed . . . . .	7
Parliamentary contract to take land for railroad purposes . . . . .	3	Not decreed of contract to operate a railroad . . . . .	8
Will be decreed to enforce contract for farm crossings . . . . .	4	Will not be enforced to transfer capital stock . . . . .	9
Will be decreed to enforce contract for use of track . . . . .	5	Of <i>ultra vires</i> contracts, will not be decreed . . . . .	10
Will be decreed for possession of mortgaged railroad, if posses-		When a remedy exists at law, or right is doubtful, will not be decreed . . . . .	11

**1. Will be decreed of a contract to convey land for right of way.**—The specific performance of an agreement to convey land for a right of way to a railroad company, on either one of two or more specified routes, if pursued by the company, will be decreed against a land holder, after *bona fide* performance of the company, by building the road upon one of the routes specified.<sup>1</sup> Nor is it any objection to a decree of specific performance of such an undertaking, that the company itself had not executed the agreement, or bound itself to perform; actual performance will stand in lieu of such obligation, and more especially when the erection of the road is followed by actual possession and use of the premises for a period of several years.<sup>2</sup>

This being a case dependent on choice of routes as a consideration, and not involving objections as an oral agreement within the statute of frauds, seems not to be in conflict with the case in 51 Georgia, where it is held that an oral promise or agreement to convey land to a railroad company for right-of-

<sup>1</sup> Western R. R. Co. v. Babcock, 6 Met. 346; Old Colony R. R. Co. v. Evans, 6 Gray, 25.

<sup>2</sup> Western R. R. Co. v. Babcock, 6

way purposes, in consideration of a promise to erect a station and depot near to the premises of the land holder so agreeing to convey, is void, as within the statute of frauds;<sup>1</sup> this, too, although the company take possession and appropriate the right-of-way land to its use. Such taking possession is not regarded as taking the case out of the statute of frauds; for by the statute in regard to right of way, the company has a right to take the land, and, therefore, are not regarded as entering into the possession by consent of the promisor, which is essential to taking the case out of the statute, but are rather regarded as having entered in the exercise of its legal right so to do.<sup>2</sup>

A railroad company which takes and holds possession under a contract of purchase, at a price to be fixed by an award, is not in a condition to resist a specific performance on the ground of an incumbrance in the title, which is removed before proceeding to enforce performance, and within a few days of the time when the deed should be made, where time is not of the essence of the contract, and the company still holds possession of the land.<sup>3</sup> Nor is it an objection to a decree for performance that improper items of value were included in the estimate of the price, where the same is known to the company, and with such knowledge they enter on and retain the possession of the land.<sup>4</sup>

A bond executed in consideration of the location of a depot in a certain place, and conditioned to convey a right of way through a certain tract of land, "and also seven acres of land in said section, tract and orchard, adjoining to said right of way on either side thereof," is sufficiently definite to decree a specific performance thereof.<sup>5</sup> The true construction of such a bond is, to grant the right of way wherever the company may choose to establish it, with three and one half acres on each side thereof through the entire tract, and of uniform width.<sup>6</sup> It is no defense to such an action that the bond was delivered to a third person in escrow, if the bond was delivered to the railroad company

<sup>1</sup> Haisten, *pltf. in error, v. Savannah, Griffin & N. Alabama R. R. Co.*, 51 Geo. 199; S. C. 6 Am. R. W. Reps. 424.

<sup>2</sup> Haisten, *pltf. in error, v. Savannah, Griffin & N. Ala. R. R. Co.*, 51 Geo. 199; S. C. 6 Am. R. W. Reps. 424.

<sup>3</sup> *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. (6 Smith), 184.

<sup>4</sup> *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. (6 Smith), 184.

<sup>5</sup> *Chidester v. Springfield & Ill. S. E. Ry. Co.*, 59 Ill. 87, 11 Am. Ry. Rep. 183.

<sup>6</sup> *Ibid.*

and acted upon by them without knowledge of any conditions.<sup>1</sup>

**2. Agreement and award to purchase land.**—Where a land holder agrees to sell to a railroad corporation lands, at a price to be fixed by arbitration, as the consideration for the land agreed to be sold, and also as compensation for damages to other lands of such land holder caused by the construction of the road, the lands so sold being for railroad purposes, and after arbitration, but before completing the bargain by conveyance and payment of the purchase money, the land owner dies, a specific performance of the contract will be decreed against the administrator and heirs of the deceased.<sup>2</sup> And where, in such case, the necessity of the suit has grown out of the omission of the land holder to make and deliver a conveyance, the costs of suit will be allowed out of the purchase money.<sup>3</sup>

**3. Parliamentary contract to take land for railroad purposes.**—In England, notice from the railroad corporation to the land holder of determination to take of his lands, under the statute, for railroad purposes, describing the same, amounts in law, by virtue of the act of Parliament upon the subject, to a contract on the part of the railroad company to purchase the lands at valuation, if the parties do not agree as to the price.<sup>4</sup> After such notice, the railroad corporation can not recede therefrom.<sup>5</sup> It is held that it is bound as by a contract to purchase, wanting in nothing but identification of the price.<sup>6</sup> The means of fixing this the statute provides for to a certainty. The notification not being followed by the railroad corporation by the necessary steps to ascertain the value and complete the contract of purchase, equity will interpose, on application of the land holder, and coerce a specific performance on the part of the railroad company. If necessary, the court will cause the means to

<sup>1</sup> *Ibid.*

<sup>2</sup> *The Midland Counties R. W. Co. v. Wescombs, infants, and J. Wescomb*, 2 Eng. R. W. & Canal Cases, 211; *Inge v. Birmingham, W. & S. V. R. W. Co.*, 23 Eng. L. & Eq. Reps. 601.

<sup>3</sup> *The Midland Counties R. W. Co. v. Wescombs*, 2 E. R. W. & Canal Cases, 211.

<sup>4</sup> *Walker v. The Eastern Counties R. W. Co.*, 5 Eng. R. W. & Canal Cases, 469.

<sup>5</sup> *Walker v. The Eastern Counties R. W. Co.*, 5 Eng. R. W. & Canal Cases, 469.

<sup>6</sup> *Walker v. The Eastern Counties R. W. Co.*, 5 Eng. R. W. & Canal Cases, 469.

be applied for ascertainment of the price, and when ascertained, will enforce performance.<sup>1</sup>

**4. Will be decreed to enforce contract for farm crossings.**—Specific performance of contracts of railroad corporations with owners of lands along the line of their roads for the erection of farm crossings over their roads and other conveniences of a local and permanent character, will, when the contract is certain, and the injury for breach thereof is continuous, and of a nature precluding any adequate remedy in damages by suit at law, be specifically enforced in equity.<sup>2</sup> And so of a contract to maintain a station at a particular place.<sup>3</sup>

**5. Will be decreed to enforce contract for use of track.**—Specific performance will be decreed to enforce contracts of a permanent nature between railroad corporations for running on and use of each other's tracks, or of the track of one corporation by the trains of another;<sup>4</sup> and such an agreement, if not limited, extends to the successors of the contracting roads, as well as to the contracting parties.<sup>5</sup>

In New York, it is held that the legislature may authorize a railroad company to use the tracks of another, subject to making compensation therefor.<sup>6</sup>

**6. Will be decreed for possession of mortgaged railroad, if possession be contracted for.**—Where a mortgage of a railroad, being in other respects valid, contains a provision that on failure

<sup>1</sup> Walker v. The Eastern Counties R. W. Co., 5 Eng. R. W. & Canal Cases, 469.

<sup>2</sup> Storer v. Great W. R. W. Co., 2 Younge & Coll. (Chan.), 48; Same case, 3 Eng. R. W. & Canal Cases, 106; Wilson v. Furness Ry. Co., Law Rep., 9 Eq. Cas. 28; Green v. West Cheshire Ry. Co., Law Rep., 13 Eq. Cas. 44.

<sup>3</sup> The Earl of Lindsay v. Great Northern R. W. Co., 19 Eng. L. & Eq. 87; Rigby v. The Great Western R. W. Co., 4 Eng. R. W. & Canal Cases, 175.

<sup>4</sup> The Great Northern Railway Co. v. The Manchester, Sheffield & L. R. W. Co., 10 Eng. L. & E. Reps. 11; Same case, 5 De Gex & Smale, 138; Great Northern Ry. Co. v. The East-

ern Counties R. W. Co., 12 Eng. L. & E. Rep. 224; S. C. 9 Hare, 306; Androscoggin & Kennebec R. R. Co. v. The Androscoggin R. R. Co., 52 Maine, 417.

<sup>5</sup> Great Northern R. W. Co. v. The Manchester, Sheffield & L. R. W. Co., 10 Eng. L. & E. Reps. 11.

<sup>6</sup> In the matter of Kerr, 42 Barb. 119; Sixth Ave. R. R. Co. v. Kerr, 45 Barb. 138. And see State v. Easton & Amboy R. R. Co., 7 Vroom, 181; Mass. Cent. R. R. Co. v. Boston, C. & F. R. R. Co., 121 Mass. 124; Lake Shore & Mich. Southern Ry. Co. v. Cin., Sandusky & Cleveland Ry. Co., 30 Ohio St. 604.

to pay certain payments therein specified, according to the tenor thereof, that the mortgagee may enter into actual possession of the mortgaged property and franchises, and run and operate the same, with full control thereof, and apply the net proceeds to the payment of the mortgage debt, a court of equity has jurisdiction to decree a specific performance of the condition, and will, by decree, cause a specific performance by putting the mortgagee into possession, upon failure to pay according to the tenor of the mortgage.<sup>1</sup> A bill in equity for enforcing a specific performance is, in such cases, the proper remedy, and the mortgagee is not bound to first seek a remedy by foreclosure, at law, under the statute.<sup>2</sup> The one remedy is to foreclose; the other is to obtain possession, operate the road, pay the debt with the proceeds, and leave the ownership in the original owners, in accordance with, and by virtue of, the contract of the parties. The mortgagees in such case do not claim to go into possession under the law of foreclosure, but by forcing, in equity, the performance of that part of the contract which entitles them to possession.<sup>3</sup>

**7. For construction of railroads, will not be decreed.**—The courts will not decree a specific performance for the building of a railroad. Equity is not the remedy. If the relief be asked by a private person, for performance of a contract, or by the company against a private person, to enforce performance of a contract of construction, it will be denied, on the ground that the remedy is at law, and equity will not enforce that which can not be done at once, and be effected, if need be, by its own decree.<sup>4</sup>

<sup>1</sup> *Shepley and others v. The Atlantic & St. Lawrence R. R. Co., and Grand Trunk R. W. Co. of Canada*, 55 Maine, 393; *Shaw and others, trustees, v. Norfolk County R. R. Co.*, 5 Gray, 162.

<sup>2</sup> *Shepley and others v. Atlantic & St. Lawrence R. R. Co., and Grand Trunk R. W. Co. of Canada*, 55 Maine, 395.

<sup>3</sup> *Shepley and others v. Atlantic & St. Lawrence R. R. Co., and Grand Trunk R. W. Co. of Canada*, 55 Maine, 395, 397.

<sup>4</sup> *Ross v. Union Pacific Ry. Co.*

(*Eastern Division*), *Woolworth's C. C. R.* 26; *Fallon v. The Railroad Co.*, 1 Dill. C. C. R. 121; *Heathcote v. The North Staffordshire Railway Co.*, 6 Eng. R. W. & Canal Cases, 358, 369; and especially where the contract is to be executed in another state: *Port Royal R. R. Co. v. Hammond*, 58 Ga. 523, 16 Am. Ry. Rep. 108. See further, *Danforth v. Phil. & Cape May Short Line Ry. Co.*, 30 N. J. Eq. 12, where specific performance was refused in favor of contractors and against the company, where the contract price was to be paid in stock and



If, on the other hand, the performance be sought as for the enforcement against the company of a charter obligation or duty, to carry out and complete its undertaking, as involving a public interest, and as impliedly resting on it from the reception of the charter grant, then the remedy is a writ of mandamus, and equity will not interfere for the enforcement thereof by decree.<sup>1</sup>

8. **Not decreed of contract to operate a railroad.**—A contract to operate a railroad will not be enforced by a decree for a specific performance. It can not be carried out at once, but would involve a series of orders and adjudications of points and questions arising from time to time, and would necessarily be continuous as a proceeding, as the business would be continuous.<sup>2</sup> In enforcing specific performance, the courts are not necessarily confined in their actions to proceedings against the defendant to coerce the performance on his part, and through his action, but may take the matter into its own hands, and in virtue of its plenary powers, do and perfect by its decree the very act which ought to have been done by the defendant; as, for instance, in a suit for a specific performance of an agreement to convey lands, the court may force the party to execute the conveyance, enforcing obedience to its decree by fine and imprisonment; or may appoint and empower a commissioner to make the conveyance, or may, by its own act, decree the title out of the defendant into the complainant; or, as is sometimes done, order the defendant to convey, and decree that in default thereof, in a

bonds of the company, and the estimates, etc., were to be made by the company. The company declared its inability to comply with the law under which it was incorporated, the penalty for which was forfeiture of its charter, and for that reason declined to proceed further under the contract.

<sup>1</sup> *The Queen v. The Eastern Counties R. W. Co.*, 1 Eng. R. W. & Canal Cases, 509; *Blakemore v. The Glamorganshire Canal Nav.*, 1 Myl. & K. 162.

<sup>2</sup> *Port Clinton R. R. Co. v. The Cleveland & Toledo R. R. Co.*, 13 Ohio St. 544. See *Blanchard v. Detroit, L. & L. M. R. R. Co.*, 31 Mich. 43; *Hood v. N. E. Ry. Co.*, Law Rep. 8 Eq. Cas. 666; *Blackett v. Bates*, Law

Rep. 1 Ch. App. 117. The case here cited was brought to enforce, against the lessees of a railroad, its operation and proper conducting under the contract of lease. *Gholson, J.*, after reviewing the cases bearing on the subject, says: "We do not see that these cases furnish a guide for our decision, and we are compelled to rely on the general principles," and that "If permissible at all, the demand for the exercise of the power should be stringent, and the circumstances of the case so peculiar, as to authorize some limit to the extent and operation of any orders which might be made:" 13 Ohio St. 557, 558.

given time, the decree of the court shall stand and be taken for a conveyance. Thus the court itself sometimes does what the defaulting party fails to do. But in a decree for the specific performance of a contract to operate a railroad, its powers fall far short in these respects. The court can neither coerce the defendant by imprisonment, if a corporation (for a corporation is intangible, and can not be imprisoned), nor can it descend from judicial position and enforce the contract practically, by operating the road itself; for that would amount to taking the whole charge of the enterprise upon itself. To our mind, the parties to such contracts should be left to their remedy at law, in an action or actions for damages, or else to proceedings by mandamus, if an ordinary action shall not meet the necessities of the case. But the breach of contracts of this and kindred nature will be restrained by injunction.<sup>1</sup>

A specific performance will not be decreed against a railroad corporation upon a contract to maintain and keep up cattle guards. There was an undertaking to "build and keep in repair" suitable cattle guards, and suit was brought to enforce, by decree of specific performance, the keeping of the same in repair after being built. The court held that the obligation to maintain and keep in repair being a continuous one, the complainant had ample remedy by action at law, from time to time, and that specific performance could not be decreed for repairs.<sup>2</sup>

9. **Will not be decreed to transfer capital stock.**—Nor will a specific performance be decreed for the delivery or transfer of shares of stock in a railroad corporation. They are a personal interest. They belong to a class of securities denominated stocks; are subject of every day sale in the stock market; no especial value attaches to one share of the same kind and company over another; and, in the language of Justice MILLER, "the money which will pay for one, will as readily purchase another. The damage, then, for failure to deliver any such shares may be awarded at law, and be an adequate compensation for the injury

<sup>1</sup> *Coe v. Louisville & Nashville R. R. Co.*, 3 Fed. Repr. 775; *Western Union Tel. Co. v. Union Pac. R. R. Co.*, *Id.* 423, 721.

<sup>2</sup> *Columbus & Shelby R. R. Co. v.*

*Watson and another*, 26 Ind. 50; *Beach and others v. Crain*, 2 N. Y. (2 Comstock), 86. But see *Aikin v. Albany, V. & C. R. R. Co.*, 26 Barb. 289.

sustained.”<sup>1</sup> A bill in equity will not be sustained to enforce the specific performance of a contract to purchase the bonds of a corporation.<sup>2</sup>

**10. Of ultra vires contracts, will not be decreed.**—Contracts which are *ultra vires*, or illegal, will not be specifically enforced in equity. The judicial tribunals of the country will not lend their aid for enforcement of that which the law, or the policy of the law, forbids. Equity will leave the parties to such contracts where it finds them, so far as a specific performance is concerned.<sup>3</sup>

**11. When a remedy exists at law, or right is doubtful, not decreed.**—Specific performance will not be decreed against a railroad company as carriers, where an adequate and plain remedy exists at law.<sup>4</sup>

Thus, a contract of a railroad corporation to accept and carry property at a particular locality or platform, will not be specifically enforced against the company, for the injured party has a plain and adequate remedy in damages by an action at law for the breach, if the contract be not lived up to by the company.<sup>5</sup> So if the equities of complainant are doubtful, or his bargain unconscionable, equity will not enforce performance;<sup>6</sup> or if he is guilty of *laches*, or there has been a change of circumstances making such a decree inequitable;<sup>7</sup> or if the agreement be indefinite or uncertain, or leaves any material matters to the discretion of the defendant;<sup>8</sup> or if the enforcement will prejudice the public safety or convenience.<sup>9</sup>

A bill for the specific performance of covenants to furnish water from a canal feeder to a mill, can not be maintained by

<sup>1</sup> *Ross v. The Union Pacific R. W. Co.* (Eastern Division), *Woolworth's C. C. R.* 26, 33.

<sup>2</sup> *Sunbury & Erie R. R. Co. v. Cooper*, 33 Penn. St. 278.

<sup>3</sup> *Great Northern R. W. Co. v. The Eastern Counties R. W. Co.*, 12 Eng. L. & E. 224.

<sup>4</sup> *Atlanta & West Point R. R. Co. v. Speer*, 32 Geo. 550; *Cincinnati & Chicago R. R. Co. v. Washburn*, 25 Ind. 259.

<sup>5</sup> *A. & W. P. R. R. Co. v. Speer*, *supra*.

<sup>6</sup> *Oil Creek R. R. Co. v. Atlantic &*

*Great Western R. R. Co.*, 57 Penn. St. 65.

<sup>7</sup> *Boston & M. R. R. Co. v. Bartlett*, 10 Gray, 384; *Western R. R. Co. v. Babcock*, 6 Met. 346; *Missouri River, Fort Scott & Gulf R. R. Co. v. Brickley*, 21 Kans. 275.

<sup>8</sup> *Blanchard v. Detroit, L. & L. M. R. R. Co.*, 31 Mich. 43; *Eastern Counties Ry. Co. v. Hawkes*, 5 H. L. Cas. 331; *Hawkes v. Eastern Counties Ry. Co.*, 1 De Gex, M. & G. 737.

<sup>9</sup> *Raphael v. Thames Valley Ry. Co.*, *Law Rep. 2 Eq. Cas.* 37.

the executors of the covenantee. On his death, the interest passed to the heirs.<sup>1</sup>

<sup>1</sup> United N. J. R. R. & Canal Co., & Ch. 261, 14 Am. Ry. Rep. 23.  
Penn. R. R. Co., *v.* Hoppock, 28 N. J.

## CHAPTER LXVI.

### TAXATION OF RAILROADS.

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#### 1. Power to tax—Power to exempt—Power to release taxes.

—The right and power to levy and collect taxes for the support of government, are attributes of sovereignty existing in every state. The extent and manner of exercising the same are purely matters of legislative discretion, within the pale of constitutional limitation.<sup>1</sup> These principles apply to all property and to every interest alike; and consequently, when not restricted by a law of the charter, are applicable to railroad corporate interests, as well as to others. It is for the state to say what shall be taxed, and what shall not.

This power to tax also carries with it the power to grant ex-

<sup>1</sup>City of Richmond v. The Richmond & Danville R. R. Co., 21 Gratt. 604; City of Dubuque v. Chicago, D. & M. R. R. Co., 47 Ia. 196.

emption from taxation. "The power of exemption," say the Supreme Court of Virginia, "as well as the power of taxation, is one of the essential elements of sovereignty. The right of a legislature to surrender the power of taxation, in specific cases, has been the subject of one of the ablest and most exhaustive judicial discussions ever known to the Supreme Court of the United States, and is now regarded as established upon the most solid foundations of public policy and expediency," and that "a power thus essential to a State, which may be exercised so advantageously for the promotion of piety, education and works of public improvement and utility, should never be held to be surrendered by mere implication, but only by plain and express language."<sup>1</sup> By the same learned tribunal it is held that under a statutory enactment that "all machines, wagons, vehicles, or carriages, belonging to" a railroad "company, with all their works, and all profits which shall accrue from the same, shall be vested in the respective shareholders forever, in pro-

<sup>1</sup> *City of Richmond v. The Richmond & Danville R. R. Co.*, 21 Gratt. 604, 613, 614; *Comm. v. Chesapeake & Ohio R. R. Co.*, 27 Gratt. 344, 17 Am. Ry. Rep. 126; *Gordon v. Appeal Tax Court*, 3 How. 133; *Wilmington R. R. Co. v. Reid*, 13 Wall. 264; *Tomlinson v. Branch*, 15 Wall. 460; *Humphrey v. Pegues*, 16 Wall. 244, 249; *Delaware Railroad Tax Cases*, 18 Wall. 206; *Erie Railroad Company v. Pennsylvania*, 21 Wall. 492, 498; *State of N. J. v. Yard*, 95 U. S. 104; *Farrington v. State of Tenn.*, *Id.* 679; *North Western University v. People*, 99 U. S. 309; *Union Pass. Ry. Co. v. City of Phil.*, 101 U. S. 528; *Louisville & Nashville R. R. Co. v. Gaines*, 2 Flip-pin, 621; S. C. 3 Fed. Repr. 266; *Cook v. The State, The Camden & Burlington Co. R. R. Co.*, prosecutor, 4 Vroom, 474; *State v. Comrs.*, 8 Vroom, 240; *Knoxville & Ohio R. R. Co. v. Hicks*, 1 Tenn. Leg. Repr. 38, 15 Am. Ry. Rep. 197 (Supreme Ct. Tenn., Sept. term, 1877); *Wisconsin Cent. R. R. Co. v. Taylor Co.*,

52 Wis. 37; S. C. 1 Am. & Eng. R. R. Cas. 532; *State v. Maine Central R. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323; *Maine Cent. R. R. Co. v. Maine*, 96 U. S. 499; *City of Portland v. Portland Water Co.*, 67 Me. 135; *State v. Dexter & N. R. R. Co.*, 69 Me. 44; *State v. Balt. & Ohio R. R. Co.*, 48 Md. 49; *Ill. Cent. R. R. Co. v. Goodwin*, 94 Ill. 262; *People v. Soldiers' Home*, 95 Ill. 561; *Mobile & Ohio R. R. Co. v. Moseley*, 52 Miss. 127; *Grand Gulf & P. G. R. R. Co. v. Buck*, 53 Miss. 246; *Scotland Co. v. Mo.*, Ia. & Neb. Ry. Co., 65 Mo. 123; *Atlantic & Gulf R. R. Co. v. Allen*, 15 Fla. 637; *Oliver v. Memphis & L. R. R. Co.*, 30 Ark. 128; *St. Louis, Iron Mountain & Southern Ry. Co. v. Loftin*, *Id.* 693. But otherwise where a constitutional provision exists requiring all property to be taxed according to its value: *City of Dubuque v. Ill. Cent. R. R. Co.*, 39 Ia. 56, 20 Am. Ry. Rep. 124; *Louisville & Nashville R. R. Co. v. State*, 8 Heisk. 663, 19 Am. Ry. Rep. 107.

portion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatever," is holden not only the specific property above enumerated is exempt, but also the real estate of the company, which the court say is included within the terms of the act. In this respect the court say: "If the exemption does not embrace the real property of the company, the legislature has perpetrated the folly of declaring that mere chattels should be deemed personal estate";<sup>1</sup> and that such exemption applies not only to state taxation, but to the right of every corporation, meaning municipal corporation, created by it.<sup>2</sup>

And where a statute declared that the real estate of corporations, "above what may be required and used by them for the transaction of their appropriate business," should be liable to taxation, it was held that the fact that wharves and docks were not at all times so used and necessary, did not render them liable to taxation; nor that they were also used for other purposes, for which wharfage was received, or that the use of a part of them was granted to another company.<sup>3</sup>

Under the statute of New Jersey, approved April 2, 1873, exempting property from taxation at the terminus of the road, it was held that the terminus of the West Jersey Railroad Co. was its original charter terminus, and not the point of intersection of a branch road subsequently authorized to be built with the road of another company.<sup>4</sup> "At the *termini*," in said act, is said to mean *near the termini*.<sup>5</sup>

Where property is exempted which is used by a railroad company "for the purposes of their road, or otherwise," it includes only such property as may be necessary or convenient for the

<sup>1</sup> City of Richmond v. The Richmond & Danville R. R. Co., 21 Gratt. 604, 608. See Hannibal & St. Jos. R.R. Co. v. Shacklett, 30 Mo. 550; Scotland Co. v. Mo., Ia. & Neb. Ry. Co., 65 Mo. 123; Town of New Haven v. City Bank, 31 Conn. 106; State v. Hood, 15 Rich. 177; Rome R. R. Co. v. Rome, 14 Ga. 275.

<sup>2</sup> City of Richmond v. The Richmond & Danville R. R. Co., 21 Gratt. 604; Mayor & Council of Baltimore v. Baltimore & Ohio R. R. Co., 6 Gill, 288.

<sup>3</sup> Osborn v. Hartford & New Haven R. R. Co., 40 Conn. 498, 5 Am. Ry. Rep. 226. And see Richmond & Danville R. R. Co. v. Comrs. of Alamance Co., 76 N. Car. 212, 14 Am. Ry. Rep. 304; Belo v. Co. Comrs., 82 Id. 415. But see, *contra*, State v. Fuller, 40 N. J. Law, 328, 17 Am. Ry. Rep. 347.

<sup>4</sup> State v. Receiver of Taxes of Camden, 38 N. J. 299, 13 Am. Ry. Rep. 50.

<sup>5</sup> *Ibid*.

legitimate purposes of the company, to accomplish the end the legislature had in view at the enacting of the charter.<sup>1</sup> The court must pass judgment upon the question of such necessity upon the fact in each case.<sup>2</sup> And though the title to the exempted lands is in another company with which the former company had consolidated, it would not affect the exemption.<sup>3</sup>

Where the land of the company is exempted from taxation until sold and conveyed, the exemption is not lost by a contract to sell which is subsequently forfeited for non-compliance with its terms.<sup>4</sup>

And so, an act of a state legislature chartering a railroad company, and declaring that all the property purchased by the president and directors, and that which may be given to the company, and the works constructed under the authority of such act of assembly, and all profits accruing on the said works, shall be vested in the shareholders, their successors and assigns forever, in proportion to their respective shares, and that the shares shall be deemed personal property, and that the property of the company, and the shares therein, shall be exempt from any public charge or tax whatever, exempts from taxation as well the property of the company of every description necessary to the use of the road, as also the franchise itself.<sup>5</sup> The franchise, which, in its application to a railroad, is the privilege of running it and taking fare and freight, is property, and of the most valuable kind; and though not of the precise character of rolling stock, road-bed, and depot grounds, is, equally with these latter, included with the term property.<sup>6</sup>

<sup>1</sup> *State v. Fuller, supra*; *State, N. J. R. R. & T. Co., prosr., v. Hancock*, 6 Vroom, 537; *State, Pa. R. R. Co., prosr., v. Elizabeth*, 12 *Id.* 319. And see *Erie Co. v. Erie & W. Trans. Co.*, 87 Penn. St. 434; *De Soto Bank v. City of Memphis*, 6 Baxt. 415; *Day v. Joiner, Id.* 441; *Milwaukee & St. Paul Ry. Co. v. City of Milwaukee*, 34 Wis. 271; *St. Louis, Iron Mountain & Southern Ry. Co. v. Loftin*, 30 Ark. 693. The test of actual use can not be applied during construction: *State v. Haight*, 6 Vroom, 40; *State v. Collr. of Middle Township*, 9 *Id.* 270;

*State v. Wetherill*, 12 *Id.* 147.

<sup>2</sup> *State v. Woodruff*, 36 N. J. Law, 94, 12 Am. Ry. Rep. 424.

<sup>3</sup> *Ibid.* As to what is a sufficient allegation of the necessity in such cases, see *Marquette, Houghton & Ontonagon R. R. Co. v. City of Marquette*, 35 Mich. 504, 16 Am. Ry. Rep. 179.

<sup>4</sup> *Ill. Cent. R. R. Co. v. Goodwin*, 94 Ill. 262.

<sup>5</sup> *Wilmington R. R. Co. v. Reid*, 13 Wall. 264.

<sup>6</sup> *Wilmington R. R. Co. v. Reid*, 13 Wall. 264. It is held generally in



Such exemption in a railroad charter, granted by an act of the legislature, amounts to a contract between such state and the railroad corporation created by or under the law embodying the same; and a subsequent act of the legislature requiring a tax to be levied and collected on the franchise, and upon the property of the company necessary to be used in prosecuting the business of the company, impairs the obligation of the contract, and is therefore void for unconstitutionality.<sup>1</sup> The Supreme Court of the United States, DAVIS, Justice, in the opinion in this case, say: "It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state can not violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded."<sup>2</sup>

But where the charter of a railroad corporation expressly allows legislative amendments to be made thereto, it is held that although it be provided therein that taxation of the company shall be by a percentage on the costs of its works, and none other, yet a general law, subsequently passed, taxing the property of all private corporations, personal and real, in kind, is valid, and has the effect of an amendment of the charter of the company in that respect.<sup>3</sup>

Maryland, that the exemption of the capital stock of a corporation operates as an exemption of its property, or so much of it as the corporation is fairly authorized to hold for the proper exercise of its franchises: *County Comrs. of Anne Arundel Co. v. Annapolis & Elk Ridge R. R. Co.*, 47 Md. 592, 18 Am. Ry. Rep. 359. And see *Scotland Co. v. Mo., Ia. & Neb. Ry. Co.*, 65 Mo. 123; *State v. Balt. & Ohio R. R. Co.*, 48 Md. 49. But where the grant of exemption in terms discriminates between the stock and other property, then there is no exemption of other property: *Memphis & Charleston R. R. Co. v. Gaines*, 97 U. S. 697; *Atlantic & Gulf R. R. Co. v. Allen*, 15 Fla. 637. The intention to exempt the stock is one of construction generally, however: *Farrington v. State of Tenn.*, 95 U. S.

679; *Belo v. Co. Comrs.*, 82 N. Car. 415; *City of Memphis v. Ensley*, 6 Baxt. 553; *Same v. Farrington*, 8 *Id.* 539.

<sup>1</sup> *Wilmington R. R. Co. v. Reid*, 13 Wall. 264; *Delaware Railroad Tax Case*, 18 Wall. 206; *Cook v. The State, The Camden & Burlington Co. R. R. Co.*, prosecutor, 4 Vroom (N. J.), 474, 478; *County Comrs. of Anne Arundel Co. v. Annapolis & Elk Ridge R. R. Co.*, 47 Md. 592, 18 Am. Ry. Rep. 359; *State v. Maine Cent. R. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323.

<sup>2</sup> *Wilmington R. R. Co. v. Reid*, 13 Wall. 266.

<sup>3</sup> *Tomlinson v. Jessup*, 15 Wall. 454, 458; *Holyoke Co. v. Lyman*, *Id.* 500; *Miller v. State*, *Id.* 488; *Atlantic & Gulf R. R. Co. v. State of Ga.*, 98 U. S. 359; *Hoge v. Richmond &*

But an act specifying a particular mode of taxation, based upon a return under oath by the president of a railroad company, showing the actual value of the railroad property, will not amount to a contract; and a subsequent act may be passed subjecting the road to taxation by a special board of equalization.<sup>1</sup>

Where, by statute, railroad companies are required, as an annual tax, to pay a certain specified per cent. of their gross earnings, and the statute declares that the same "shall take the place and be in full of all the taxes of every name and kind upon said roads, or other property belonging to said companies, or the stock held by individuals therein, and it shall not be lawful to levy or assess thereupon any other or further assessment or tax for any purpose whatsoever," there is absolute exemption of such roads, and the property and stocks thereof, from all taxes and assessments of every nature.<sup>2</sup> And this, too, notwithstanding a

Danville R. R. Co., 99 U. S. 348; The State of New Jersey, The Morris & Essex R. R. Co., prosecutors v. Miller, 1 Vroom (N. J.), 368; The State, The Jersey City & Bergen R. R. Co., prosecutors, v. Mayor and Council of Jersey City, 2 Vroom (N. J.), 575; The State, The Morris & Essex R. R. Co., prosecutors, v. Miller, 2 Vroom (N. J.), 521; State v. Comr. of R. R. Taxation, 8 Vroom, 228; S. C. 9 *Id.* 472; West Wis. Ry. Co. v. Supervisors of Trempealeau Co., 35 Wis. 257. And so where the franchises are re-granted, it is competent to alter the contract of exemption: City of St. Paul v. St. Paul & Sioux City R. R. Co., 23 Minn. 469; as in case of consolidation: State v. Maine Cent. R. R. Co., 66 Me. 488, 19 Am. Ry. Rep. 323; Maine Cent. R. R. Co. v. Maine, 96 U. S. 499. And where a statute exists, providing that acts of incorporation thereafter passed shall be liable to be so amended, it will apply to an act authorizing a consolidation of existing corporations (which is here held to be the charter of the consolidated company), so as to terminate an exemption given by the charters of

the original companies: *Ibid*; State v. Northern Cent. Ry. Co., 44 Md. 131; Shields v. State of Ohio, 95 U. S. 319. And see Bangor, O. & M. R. R. Co. v. Smith, 47 Me. 34; Roxbury v. Boston & Providence R. R. Co., 6 Cush. 424. A consolidation is held to operate as an extinction of the old corporations: Shields v. Ohio, *supra*; Atlantic & Gulf R. R. Co. v. State of Ga., 98 U. S. 359; State v. Atlantic & Gulf R. R. Co., 60 Ga. 268.

<sup>1</sup> State v. Hannibal & St. Joseph R. R. Co., 60 Mo. 143, 9 Am. Ry. Rep. 239; Christ Church v. Phil. Co., 24 How. 300; Tucker v. Ferguson, 22 Wall. 527. There must be a consideration: Tucker v. Ferguson, *supra*; Union Pass. Ry. Co. v. City of Phil., 101 U. S. 528; People v. Comrs. of Taxes, 19 Hun, 460; S. C. 82 N. Y. 459; St. Louis, Iron Mountain & Southern Ry. Co. v. Loftin, 30 Ark. 693.

<sup>2</sup> Brightman v. Kirner, 22 Wis. 54; City of St. Paul v. St. Paul & Sioux City R. R. Co., 23 Minn. 469, 17 Am. Ry. Rep. 177; State v. Maine Cent. R. R. Co., 66 Me. 488, 19 Am. Ry. Rep. 323; State of New Jersey v. Yard, 95 U. S. 104; Farrington v. State of

provision in the charter of such roads, or of any of them, existing at the time of the passage of such exemption law, in substance, that real estate exempted from taxation by the laws of the state should nevertheless be subject to special taxes, and that no law of the state contravening such charter provision should be considered as amending or modifying the same, unless expressly so stated therein.<sup>1</sup> It is out of the power of the legislature to bind itself by an inhibition of the kind. What is done at one session, if no rights have vested to prevent it, may be undone at another;<sup>2</sup> and this, too, whether the intention to repeal be openly expressed, or the repeal results from the effect of subsequent acts, though not expressly stated to be the purpose thereof.<sup>3</sup> From these principles it results, therefore, that levies of special taxes for local improvements, and sales of lands or property made under such levy, or for the enforcement and collection of such special tax, in the face of such exemption, are simply void;<sup>4</sup> for notwithstanding a provision in the charters that railroad companies shall be subject to special taxes for local or street improvements, yet such provision being for the benefit of the state, it may be subsequently modified by the state, by such legislative enactments as completely exempt these corporations therefrom, if such exemption violates no vested right.<sup>5</sup>

And a provision in the charter of a private corporation exempting it from taxation, either wholly or partially, or except under specified circumstances yet to occur, is valid, and laws made in violation thereof, unless accepted by those on whom they are intended to act, are invalid, as violating the charter contract, if there be no general law entering therein, or clause in the charter, allowing such alterations or amendments.<sup>6</sup>

Tenn., *Id.* 679. And this is so whether the property is used for railroad purposes or not: *Osborn v. New York & New Haven R. R. Co.*, 40 Conn. 491, 5 Am. Ry. Rep. 218.

<sup>1</sup> *Brightman v. Kirner*, 22 Wis. 54.

<sup>2</sup> *Brightman v. Kirner*, 22 Wis. 54.

<sup>3</sup> *Brightman v. Kirner*, 22 Wis. 54.

<sup>4</sup> *Brightman v. Kirner*, 22 Wis. 54; *State v. Jersey City*, 36 N. J. Law, 56, 12 Am. Ry. Rep. 302; *First Div. St. Paul & Pacific R. R. Co. v. City of St. Paul*, 21 Minn. 526, 18 Am. Ry. Rep.

435; *Olive Cemetery Co. v. City of Phil.*, 93 Penn. St. 129; S. C. 10 Repr. 183. But where the proviso was "that no other tax or impost shall be levied or assessed upon said company," it was held the company was not exempt from assessments for local improvements: *State, N. J. Midland R. R. Co., prosr., v. Mayor, etc., of Jersey City*, 42 N. J. 97; S. C. 1 Am. & Eng. R. R. Cas. 406.

<sup>5</sup> *Brightman v. Kirner*, 22 Wis. 54.

<sup>6</sup> *State v. Miller*, 1 Vroom, 368; *State v. Person*, 3 Vroom (N. J.), 566; *The*

A contract of a state with a railroad corporation not to tax the company or its property, is broken by the levy of a tax upon its gross receipts for transporting freight and passengers; and a provision exempting a company from taxation, embodied in the charter granted by act of assembly to a railroad corporation, or in a special enactment in aid of the charter, and accepted by the company, is such a contract.<sup>1</sup> The attempt to levy or enforce such a tax, in violation of such contract, is void, although the same be made in the shape of an ordinance adopted as part of a new constitution of the state.<sup>2</sup>

A statute which in terms exempts all the property of a railroad corporation from taxation, exempts not only the rolling stock and real estate of the company, necessarily acquired by it for the successful transaction of its business, but also exempts its franchise.<sup>3</sup> And so does a contract exempting a railroad, road-beds, buildings, machinery, cars and other property from taxation; it exempts also the franchise, and the proceeds or receipts of the company, from taxation.<sup>4</sup> If such exaction is a tax, it is void for violation of the charter; if it is not a tax, it is still void as "an act of high-handed violence," and "forcible seizure of private property."<sup>5</sup>

A charter imposition of tonnage on merchandise transported, and the exaction of a capitation tax on passengers transported, by a railroad company, exempts the company from all other taxes and modes of taxation, for state, county or township purposes.<sup>6</sup> In one sense, all taxes are state taxes; they are raised under the

State, *The Orange & Newark Horse Car R. R. Co., prosecutors, v. Douglass*, 5 Vroom (N. J.), 82; *Douglass v. The State, The Orange & Newark Horse Car R. R. Co., prosecutors*, 5 Vroom, 485; *McGavisk v. The State, Morris & Essex R. R. Co., prosecutors*, 5 Vroom (N. J.), 509; *The State, The New Jersey R. R. & Trans. Co., prosecutors, v. Haight*, 5 Vroom (N. J.), 319; *State v. Winona & St. Peter R. R. Co.*, 21 Minn. 315, 18 Am. Ry. Rep. 440; *State of N. J. v. Yard, supra*; *Farrington v. State of Tenn., supra*.

<sup>1</sup> *Pacific R. R. Co. v. Maguire*, 20

Wall. 36.

<sup>2</sup> *Pacific R. R. Co. v. Maguire*, 20 Wall. 36.

<sup>3</sup> *Pacific R. R. Co. v. Maguire*, 20 Wall. 36, 44.

<sup>4</sup> *Pacific R. R. Co. v. Maguire*, 20 Wall. 36.

<sup>5</sup> *Pacific R. R. Co. v. Maguire*, 20 Wall. 36.

<sup>6</sup> *The Camden & Amboy R. R. Co. v. Hillegas and others*, 3 Harrison (N. J.), 11, 13; *State v. Hancock*, 6 Vroom, 537; *City of Baltimore v. Balt. & Ohio R. R. Co.*, 6 Gill, 288; *Neustadt v. Ill. Cent. R. R. Co.*, 31 Ill. 484; *Southern R. R. Co. v. Jackson*, 38 Miss. 334.

authority of the state, directly or indirectly, and are for the support of the government in some one or other of its different departments or attributes.<sup>1</sup>

Where a statute requires railroad corporations to make annual returns of their taxable property to the board of equalization, under a penalty imposed by the statute for omitting so to do, on demand, except the omission be for reasonable excuse, such excuse is matter of evidence in defense, when criminally prosecuted before the judiciary, under the statute, for omitting to make the return, and can in no manner come under consideration of the board to whom return should have been made. In case of such omission, no act of equalization is to be performed by them, but the assessment as made by the assessor must stand as the proper and sufficient assessment, if otherwise regular.<sup>2</sup>

It is held, in some of the states, that where a railroad company is subject to a tax of a specified per centum upon its capital stock, and is exempted by law from all other taxation, that such exemption extends only to its works and property within the limit of land which it is by law authorized to take by the right of eminent domain, and that outside property, as a branch track leading to a gravel bed, and other outside erections, including, in some instances, depot houses and other erections, are subject to taxation as is ordinary property, notwithstanding such exemption.<sup>3</sup>

Though the shares of capital stock in a railroad company or other private corporation represent the realty, as well as the personalty of the company, and are, as a general principle, recognized and regarded in law as personalty, or a personal interest,

<sup>1</sup>The Camden & Amboy R. R. Co. v. Hillegas, 3 Harrison (N. J.), 11, 13.

<sup>2</sup>State, *ex rel.* Thompson, v. Board of Equalization of Washoe County, 7 Nev. 83. And the fact that a railroad company is chartered by act of Congress, does not exempt it or its property, *per se*, from state taxation: State v. Cent. Pac. R. R. Co., 10 Nev. 47, 58; Union Pac. R. R. Co. v. Peniston, 18 Wall. 5. Under the 2d section of the New Jersey statute of April 2, 1873, where no return is made of the cost of the property, the state has no

claim for the tax: Williamson v. New Jersey Southern R. R. Co., 28 N. J. Ch. 277, 14 Am. Ry. Rep. 34.

<sup>3</sup>The State of New Jersey, The New Jersey R. R. & Trans. Co., prosecutor, v. Hancock, 4 Vroom (N. J.), 315; The Inhabitants of Worcester v. The Western R. R. Co., 4 Met. 564. And see Chicago, Milwaukee & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217, 17 Am. Ry. Rep. 44. But an exemption of the road and its appurtenances will include a branch road: Atlantic & Gulf R. R. Co. v. Allen, 15 Fla. 637.

when not otherwise provided by statute, yet it is within the power of the legislative department to class it under a different designation, and to call and treat the whole corporate interest or property of the road, rolling stock and appurtenances, as realty, if in its wisdom it thinks proper so to do for purposes of taxation.<sup>1</sup>

Where, by the statute, railroad corporations are taxable at a given valuation per mile, including depot grounds and improvements, with right of way, engines, rolling stock, and other investments for the uses and purposes of the road, at the same rate as by law is levied on real estate, and payable to the state treasurer for a specified purpose, no authority exists for assessing and taxing them in the ordinary manner for county purposes;<sup>2</sup> but if the owner of property not connected necessarily with the uses and operating of the road, such latter property is assessable as property ordinarily is for county purposes.<sup>3</sup>

And though a license be paid for the annual use of public streets, yet it does not amount to an exemption from taxation. The rule is that a provision in a street railway grant of the use of streets, requiring a license of a fixed sum in money to be annually paid to the town or city, in consideration of the privilege granted, is not in the nature of an ordinary tax, and will not preclude or stand in lieu of ordinary taxation of the company upon its property.<sup>4</sup> And where, by statutory enactment, an exaction of ten per cent. additional upon the amount of such ordinary tax is made, for non-payment thereof when due, such ad-

<sup>1</sup> The Louisville & New Albany R. R. Co. v. The State, *ex rel.* of McCarty, Auditor, 25 Ind. 177.

<sup>2</sup> Louisville & Nashville R. R. Co. v. Warren County Court, 5 Bush, 243. The exemption here adjudged would seem to be predicated, but the court do not say so, upon the idea that the whole taxable proportion or liability of the company had been concentrated, in law, under the one head for a particular object.

<sup>3</sup> Louisville & Nashville R. R. Co. v. Warren County Court, 5 Bush, 243.

<sup>4</sup> Louisville City Railway Co. v. City

of Louisville, 4 Bush (Ky.), 478. And where the charter provides that the company shall pay "such license for each car run by said company as is now paid" by other lines, it was held the amount might be increased by act of the legislature: Union Passenger Ry. Co. v. City of Philadelphia, 83 Penn. St. 429, 15 Am. Ry. Rep. 431. And where the acts conferred benefits on the company, and such increased tax was paid for a number of years, the acquiescence was construed to be an acceptance of the act to obtain such benefits. *Ibid.*

ditional sum is not to be treated as a penalty, but as a part of the tax itself.<sup>1</sup>

By amendment to the state constitution of Pennsylvania, made in 1857, alterations of corporate charters were permitted, provided no injustice was done to the corporation. Under this provision, it was held that a general law imposing a reasonable license tax on all corporations of a particular kind, did not do injustice within its meaning.<sup>2</sup>

The ruling in Maine is that taxes assessed upon a railroad company by a municipal corporation, by virtue of a state law, may be released or defeated by the repeal of the law by the same power that made it; and a provision in the repealing act that "no proceedings under the act hereby repealed shall be hereafter enforced," will effectually bar all future proceedings to collect the tax,<sup>3</sup> even if such would not have been the effect of the mere repeal, without a saving clause, as we conceive it would be; for a tax, though duly assessed, is not a debt, and the repeal of a law allowing the assessment, and an enactment of another prohibiting collection of the tax, is not impairing the obligation of a contract.<sup>4</sup> In New Jersey, and in Iowa, however, the ruling is to the contrary; the courts of these states holding that the repeal of a law authorizing the levy of a tax, after the levy is completed, does not invalidate the tax; the same may be collected

<sup>1</sup> Louisville City Railway Company v. The City of Louisville, *supra*.

<sup>2</sup> Union Pass. Ry. Co. v. City of Phil., *supra*.

<sup>3</sup> City of Augusta v. North, 57 Maine, 392; S. C. 2 Am. R. 55.

<sup>4</sup> City of Augusta v. North, 57 Maine, 392; Shaw v. Peckett, 26 Vt. 482; Lane County v. Oregon, 7 Wall. 71; Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush, 673, 18 Am. Ry. Rep. 221. But see, *contra*, City of Dubuque v. Illinois Central R. R. Co., 39 Ia. 56; S. C. 8 Am. Ry. Rep. 496, and 20 Am. Ry. Rep. 124; Perry County v. Selma, Marion & Memphis R. R. Co., 58 Ala. 546, 20 Am. Ry. Rep. 372. The proceeding to collect

taxes not being one to collect a debt, no set-off can be pleaded: N. & C. B. Co. v. Douglass, *supra*. And so taxes may be collected after the year in which they are assessed, and the legal liability to pay may be enforced by an action at common law, unless the statutes provide an exclusive remedy: Perry Co. v. S., M. & M. R. R. Co., *supra*; Dubuque v. Ill. Cent. R. R. Co., *supra*. Statutes of limitation, where they exist, run against such claims. In Alabama there is none applicable to such a case, and the only defense is a presumption of payment arising from lapse of not less than twenty years: Perry Co. v. S., M. & M. R. R. Co., *supra*.

under the general law, for the time being, for collection of taxes.<sup>1</sup> But if a penalty is enacted by the law thus repealed, the repeal effectually destroys the penalty for the future. No further penalty for non-payment can be incurred under a law that is repealed; for the repeal makes things of the future as if the law had never existed, except as to transactions which are past, and of such is the levy.<sup>2</sup>

Under an act exempting the real estate of a railroad company from taxation until their dividends shall equal a certain per cent., a dividend of about three times that per cent., but payable in Confederate money, will not terminate the exception.<sup>3</sup> Nor will the receipt, as rent from another company, of such percentage, have that effect.<sup>4</sup>

Where it appears upon the face of a legislative act of exemption that it is passed upon the assumption that the railroad company for whose benefit it is intended then owned and held all the lines of road authorized to be built under its charter, an acceptance of its benefits will estop the company, and all claiming under it, from disputing such assumption.<sup>5</sup> The exemption therein contained was not simply a personal privilege, but was in the nature of a conditional grant, appurtenant to the several lines, and charged with the burden of an annual payment as therein provided, and dating from the completion of a specified length of line.<sup>6</sup> In case of a severance and division of such lines and their franchises among different companies, reference must be had to such time of completion in ascertaining the amount each company is to pay during any given year.<sup>7</sup> Reference must also be had to the date of the passage of the act, as the time when, for such purpose, the required section is deemed to have been completed.<sup>8</sup>

<sup>1</sup> The Town of Belvidere v. The Warren R. R. Co., 5 Vroom (N. J.), 193; City of Dubuque v. Illinois Central R. R. Co., 39 Ia. 56, 8 Am. Ry. Rep. 496. In the latter case a law releasing a tax duly levied by a municipal corporation was held unconstitutional, as impairing the obligation of a contract.

<sup>2</sup> The Town of Belvidere v. The Warren R. R. Co., 5 Vroom (N. J.), 193.

<sup>3</sup> Richmond & Danville R. R. Co. v. Brogden, 74 N. Car. 707, 13 Am. Ry. Rep. 114.

<sup>4</sup> Richmond & D. R. R. Co. v. Brogden.

<sup>5</sup> Chicago, Milwaukee & St. Paul Ry. Co. v. Pfaender, 23 Minn. 217, 17 Am. Ry. Rep. 44.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*



**2. Exemption never implied.**—The principle is well settled that the taxing power of the government is never presumed to have been relinquished, unless “the intention to relinquish is declared in clear and unambiguous terms.”<sup>1</sup> Therefore, it follows upon general principles, that unless there be some provision of law exempting the franchise, stocks and property of a railroad company from taxation, it is liable, by taxation in a just and proper manner, to bear its share of the public burdens.<sup>2</sup>

<sup>1</sup> *Phila. & Wilmington R. R. Co. v. Maryland*, 10 How. 376; 1 Am. R. Way Cases, 21, 37; *Thomson v. Pacific R. R. Co.*, 9 Wall. 579; *Wilmington R. R. Co. v. Reid*, 13 Wall. 264; *Minot v. Phila., Wilmington & Baltimore R. R. Co.*, and others, 18 Wall. 206; *North Missouri R. R. Co. v. Maguire*, 20 Wall. 46; *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492; *Tucker v. Ferguson*, 22 Wall. 527, 575; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Hoge v. Richmond & Danville R. R. Co.*, 99 U. S. 348; *Union Pass. Ry. Co. v. City of Phil.*, 101 U. S. 528; *Union Pacific R. R. Co. v. Lincoln County*, 1 Dill. 314; *S. C. 1 Withrow's Corp. Cas.* 125; *St. Louis v. Boatmen's Ins. & Trust Co.*, 47 Mo. 155; *North Missouri R. R. Co. v. Maguire*, 49 Mo. 490; *Pacific R. R. Co. v. Cass Co.*, 53 Mo. 17; *New York & Erie R. R. Co. v. Sabin*, 26 Penn. St. (2 Casey), 242; *Erie R. W. Co. v. The Commonwealth*, 66 Penn. St. 84; *S. C. 5 Am. R.* 351; *Jones & Nimick Mfg. Co. v. Comm.*, 69 Penn. St. 137; *Bradley v. McAtee* and others, and city of Louisville, 7 Bush (Ky.), 667; *Evansville, Henderson & Nashville R. R. Co. v. The Commonwealth of Ky.*, 9 Bush (Ky.), 438, 442; *Wilson v. Gaines*, 9 Baxt. 546, 16 Am. Ry. Rep. 316; *Comm. v. Chesapeake & Ohio R. R. Co.*, 27 Gratt. 344, 17 Am. Ry. Rep. 126; *County Comrs. of Anne Arundel Co. v. Annapolis & Elk Ridge R. R. Co.*, 47 Md. 592, 18 Am. Ry. Rep. 359; *County Comrs. v.*

*Sisters of Charity*, 48 Md. 34; *Appeal Tax Court v. Rice*, 50 Md. 302; *Same v. St. Peter's Acad.*, *Id.* 321; *State v. Maine Cent. R. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323; *People v. Comrs. of Taxes*, 76 N. Y. 64; *People v. Comrs. of Taxes*, 82 N. Y. 459; *S. C. 19 Hun*, 460; *St. Louis, Iron Mountain & Southern Ry. Co. v. Loftin*, 30 Ark. 693. In the case of *Bradley v. McAtee*, above cited, the Court of Appeals of Kentucky hold that the intent must not only be clearly expressed, but add also that “even then the state will not be irrevocably bound, unless some duty is imposed upon the tax-payer as the consideration of the grant, which the citizens of the state are not generally required to perform; or unless, by the exemption, he is induced to embark in some enterprise, or to invest his means in some adventure which, if successful, will result advantageously to the state as well as to himself.” 7 Bush, 667.

<sup>2</sup> *Erie Ry. Co. v. The Commonwealth*, 66 Penn. St. 84; *Phila. & Wilmington R. R. Co. v. Maryland*, 10 How. 376, 1 Am. R. Way Cases, 21, 37; *Thomson v. Pacific R. R. Co.*, 9 Wall. 579; *Wilmington R. R. Co. v. Reid*, 13 Wall. 264; *Minot v. The Phila., Wilmington & Baltimore R. R. Co. and others*, 18 Wall. 206; *Erie Ry. Co. v. Pennsylvania*, 21 Wall. 492; *Bailey v. Magwire*, 22 Wall. 215; *Richmond & Danville R. R. Co. v. Brogden*, 74 N. Car. 707, 13 Am. Ry. Rep. 114.

In the leading case here cited, the Supreme Court of the United States, TANEY, Chief Justice, hold the following language upon this subject: "certainly there is no reason why the property of a corporation should be presumed to be exempted, or should not bear its share of the necessary public burdens, as well as the property of individuals. This court on several occasions has held, that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms."<sup>1</sup>

If the company be taxed in two different places for the same interest or property, it may file its bill of interpleader, and compel the collectors of the tax in those places to settle the right to the tax between themselves.<sup>2</sup>

Nor is the interest of the National Government in the Union Pacific Railroad of such a character as to exempt said road, by implication, from the taxing power of the state. "If it be in any sense a federal instrumentality, the rights of government, under the incorporating act, are fully protected and reserved, and any rights derived from a sale for taxes under state authority are entirely subordinate to the original, paramount and indefeasible rights of the general government; can not destroy the corporation, nor incapacitate it from discharging any of its inalienable, fundamental and organic duties to the government." Such is the language of the Circuit Court of the United States for the district of Nebraska, DILLON, Justice.

In the same case, the court say: "The state can not tax this corporation out of existence. It can not sell or destroy its franchise (derived from Congress) to be a corporation. The public duties which it owes to the government it will owe into whose-soever hands its other subordinate and assignable franchises or property may pass."<sup>3</sup>

\* The mere fact that a valid consideration is paid by a railroad company to the state for its charter privileges, there being no

<sup>1</sup> Phila. & Wilmington R. R. Co. v. Maryland, 10 How. 376, 1 Am. Ry. Cases, 21, 37; County Comrs., etc., v. A. & E. R. R. Co., *supra*; State v. Maine Cent. R. R. Co., *supra*.

<sup>2</sup> The Mohawk & Hudson Railroad Co. v. Clute, 4 Paige, 384; S. C. 2

Am. R. W. Cas. 552.

<sup>3</sup> Union Pacific R. R. Co. v. The County of Lincoln, 1 Dill. 314; S. C. 1 Withrow's Corp. Cas. 124, 136. See Same Co. v. Peniston, 18 Wall. 5; Huntington v. Cent. Pac. R. R. Co., 2 Sawyer, 503.

other or express claim of exemption, does not confer on such company immunity from taxation, any more than does the payment of a fair consideration to the government for a grant of lands confer or carry with it immunity from the assessment and collection of taxes by such government on such lands. Nor does the additional circumstance that, by the charter of such railroad company, it be stipulated that the company submits to taxation of its stock; the sovereign power of general taxation still remains in the state, and may be exercised in such other mode of taxation as is exercised generally toward the interests and property of other persons.<sup>1</sup> But *quære*, if such taxing power may be exercised, upon legitimate principles, so as to amount to double taxation of the same interests, in favor of one and the same branch of the government?

In the case cited from 18 Wallace, *Minot v. The Philadelphia, Wilmington & Baltimore Railroad Company and others*,<sup>2</sup> the Supreme Court of the United States re-assert the doctrine that the state may exempt certain property from taxation, at its discretion (when not inhibited by constitutional provisions), but that such exemption must be express and clear, and beyond a reasonable doubt, and will never be inferred or implied in law; and that therefore a statutory provision in an act of assembly consolidating two railroads, that the new company should pay an annual tax to the state of one-quarter of one per cent. upon its capital stock, unaccompanied with any words indicating an intention that such should be the only tax levied upon the company, did not exempt it from a subsequent change in the manner or amount of its taxation.

By the ordinance of the Missouri convention of 1867, provision is made for a tax upon certain railroads situate in that state, to raise a fund to satisfy certain bonds of such companies due to or guaranteed by the state; such tax to be upon the gross receipts of the railroad companies, annually, and to continue until such bonds were fully paid, and no longer. The enforcement

<sup>1</sup> *Erie R. W. Co. v. The Commonwealth*, 66 Penn. St. 84; S. C. 5 Am. R. 351.

<sup>2</sup> 18 Wall. 206. See, also, *North Missouri R. R. Co. v. Maguire*, 20 Wall. 46, to the same effect. And

where the exemption is of the property of one of the consolidating companies, it will not be extended to that of the other: *Chesapeake & Ohio R. R. Co. v. State of Va.*, 4 Otto, 718, 16 Am. Ry. Rep. 155.

thereof was resisted, on the ground of the alleged unconstitutionality of the ordinance, and the Supreme Court of the state held it to be constitutional and valid.<sup>1</sup> The alleged unconstitutionality was the violation of the fifth and seventh amendments of the United States Constitution, and also the provision declaring that no state shall pass any law impairing the obligation of a contract. It was claimed, as an objection to the ordinance, that it violated a certain act of assembly of Feb. 16, 1865, in relation to the said indebtedness, which act was, in effect, a contract between the railroad company and the state, and that the ordinance impaired said legislative contract as to the order of payment, and gave undue priority to the state over other creditors; but the Supreme Court of Missouri, admitting the existence of said legislative contract, held the ordinance valid and constitutional, as the mere exercise of the unrelinquished taxing power of the state, which is never relinquished by implication.

Where a corporation has acquired by its charter the "rights and privileges" of another corporation named, it is not thereby exempted from taxation because the other company, by its charter, is exempted. An exemption is not the right or privilege intended.<sup>2</sup> Such an exemption, also, is personal, and can not be

<sup>1</sup> *North Missouri R. R. Co. v. Maguire*, 49 Mo. 490; S. C. 8 Am. R. 141.

<sup>2</sup> *Wilson v. Gaines*, 9 Baxt. 546; S. C. 16 Am. Ry. Rep. 316; *County Com'rs of Anne Arundel Co. v. Annapolis & Elk Ridge R. R. Co.*, 47 Md. 592, 18 Am. Ry. Rep. 359; *Annapolis & Elk Ridge R. R. Co. v. Anne Arundel Co.*, 103 U. S. 1; S. C. 1 Am. & Eng. R. R. Cas. 403; *Trask v. Maguire*, 18 Wall. 391; *Morgan v. State of La.*, 93 U. S. 217; *State v. Morgan*, 28 La. Ann. 482; *Memphis & Charleston R. R. Co. v. Gaines*, 97 U. S. 697; *East Tenn., Va. & Ga. R. R. Co. v. Hamblen Co.*, 102 U. S. 273. And so as to "immunities": *State v. Maine Cent. R. R. Co.*, 66 Me. 488, 19 Am. Ry. Rep. 323. But see *Comm. v. Chesapeake & Ohio R. R. Co.*, 27

*Gratt.* 344, 17 Am. Ry. Rep. 126; *First Div. St. Paul & Pacific R. R. Co. v. Parcher*, 14 Minn. 297; *State v. Winona & St. Peter R. R. Co.*, 21 *Id.* 315, 18 Am. Ry. Rep. 440; *State v. Southern Minn. R. R. Co.*, *Id.* 344. See, as to what will amount to a sale of lands covered by mortgage to secure bonds, where some of the bonds are outstanding: *State v. Trustees of Southern Minn. R. R. Co.*, 21 Minn. 344, 19 Am. Ry. Rep. 239. In *State v. Maine Central R. R. Co.*, *supra*, this rule was applied to a corporation reorganized by purchasers at a mortgage sale of the road, and who were invested by statute "with all the chartered and legal rights and immunities" pertaining to the original company at the time of foreclosure. Such a provision, however, will be strictly construed:

assigned.<sup>1</sup> And where the property which is sought to be taxed is not a part of the original line of the exempted company, but separate property upon the new line, the reasons apply with additional force.<sup>2</sup> And also where the exempted corporation, in order to entitle itself to the exemption, is required to make certain returns, etc., which can not be made by the new or consolidated corporation.<sup>3</sup>

Railroad companies do not come within the terms of the Tennessee statute<sup>4</sup> exempting banks, banking associations, or any other joint stock company, from taxation, and laying the tax on the stockholders.<sup>5</sup> The constitutional provision of that state requiring all property to be taxed according to its value, was held to forbid the making of such exemption.<sup>6</sup>

In New Jersey it is held that the acts of that state of 1873 and 1876, relating to taxation, do not apply to foreign corporations; and an act granting the right to a foreign corporation to build a bridge over the Delaware river, does not confer any franchise, or render it a domestic corporation, so as to bring it within those acts. Such part of the bridge as is within the state of New Jersey is taxable under its general laws.<sup>7</sup>

Bowling Green & M. R. R. Co. v. Warren Co. Court, 10 Bush, 711. And where the consolidated company is to "have all the powers, privileges and immunities possessed by each of the corporations entering into the agreement of consolidation," it carries only such as they all have, and excludes such special privileges as some have and others have not: *State v. Me. Cent. R. R. Co.*, *supra*. Immunity from taxation is not a franchise, so as to pass under that head: *Ibid.*; *Morgan v. Louisiana*, 3 Otto, 217. It is competent for the legislature to grant to the new corporation the exemptions of the old, and such grant will be presumed from a grant of the "rights, powers and privileges" of the old corporation: *Louisville & Nashville R. R. Co. v. Gaines*, 2 Flippin, 621; S. C. 3 Fed. Repr. 266; *Atlantic & Gulf R. R. Co. v. Allen*, 15 Fla. 637.

<sup>1</sup> *Wilson v. Gaines*, *supra*. But see

*Comm. v. C. & O. R. R. Co.*, *supra*.

<sup>2</sup> *Comm. v. Ches. & Ohio R. R. Co.*, *supra*, and *Chesapeake & Ohio R. R. Co. v. Virginia*, 94 U. S. 718. And see *Branch v. City of Charleston*, 92 U. S. 677; *State v. Com'r of R. R. Tax'n*, 8 Vroom, 240.

<sup>3</sup> *State v. Me. Cent. R. R. Co.*, *supra*, and *Maine Cent. R. R. Co. v. Maine*, 96 U. S. 499. See *Cent. R. R. & B. Co. v. State of Ga.*, 92 U. S. 665; S. C. 54 Ga. 401; *Atlantic & Gulf R. R. Co. v. State of Ga.*, 98 U. S. 359; *State v. Atlantic & Gulf R. R. Co.*, 60 Ga. 268; *Mobile & M. Ry. Co. v. Steiner*, 61 Ala. 559.

<sup>4</sup> Act of 1873, ch. 118, sec. 8.

<sup>5</sup> *Louisville & Nashville R. R. Co. v. State*, 8 Heisk. 663, 19 Am. Ry. Rep. 107.

<sup>6</sup> *L. & N. R. R. Co. v. State*.

<sup>7</sup> *State, Lehigh Valley R. R. Co., pros'r, v. Mutchler*, 42 N. J. 461; S. C. 1 Am. & Eng. R. R. Cas. 395.

**3. Sometimes exempted as public works.**—In an early case in the legal history of railroads in Massachusetts, it was holden that railroads were exempt from taxation upon general principles applicable to all public works, so far as regarded the lands and interests necessary to the public easement. The Supreme Court of that state, SHAW, Chief Justice, say: "It is true, that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public. The company have not the general power of disposal, incident to the absolute right of property; they are obliged to use it in a particular manner, and for the accomplishment of a well defined public object." "Treating the railroad then as a public easement, the works erected by the corporation as public works, intended for public use, we consider it well established that, to some extent at least, the works, necessarily incident to such public easement, are public works, and as such exempted from taxation."<sup>1</sup>

The extent of the exemption, where it is adjudged to exist, is ascertainable by considering the extent of the public easement intended to be acquired, secured and maintained, and the franchise granted to enable the corporation to accomplish the intended end. Transportation of persons and goods being an object to be accomplished, for this purpose the company may hold, and must use, lands, materials, engines, cars, warehouses, and other interests, both movable and immovable. The establishment of the track, and the maintenance of these works and things for the transportation of persons and property, are all combined together as one public object to be attained, and the privileges incident to the one are incident to the other. For such lands as the company are authorized to take, or buy to the same extent, it is holden that the company are "not liable to taxation;" "nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper and convenient use, for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accommodation of passen-

<sup>1</sup>Inhabitants of Worcester v. The Western R. R. Co., 4 Met. 564, 1 Am. R. W. Cases, 350, 352; Boston & Me. R. R. Co. v. City of Cambridge, 8

Cush. 237; Wayland v. Co. Comrs., 4 Gray, 500; City of Charlestown v. Co. Comrs., 1 Allen, 199; Comm. v. Lowell Gas Light Co., 12 Allen, 75.

gers, and warehouses for the convenient reception, preservation and delivery of merchandise and all goods and articles carried on the road.<sup>1</sup> But lands acquired, and buildings erected, outside the limit allowed by law for the purposes of the franchise, were holden to not be entitled to such exemption; and so likewise of any part of the lands acquired within the limit or quantity fixed by law as liable to be taken for the franchise, if afterward used for other purposes, the part so diverted to other purposes becomes liable to taxation.<sup>2</sup>

4. **Of exemption from taxation as federal agencies.**—A tax upon the property of a railroad corporation, not including the franchise or corporate entity, nor being a tax upon any act which the company is authorized or required to perform or do, is not an interference with the exercise of any of the powers or functions of the general government, and is therefore not prohibited by any constitutional inhibitions, either expressed or implied, notwithstanding such company may be used in many respects as a federal agency; this, too, whether the corporation be created by state or by federal legislation. Such tax leaves the corporation free to discharge its duties toward the government, and in no manner impairs its efficiency as a government agent, or in the performance of the functions by which it is designed to serve the government.<sup>3</sup> But a tax upon the operations of the company is a different thing, and will amount to an obstruction to the exercise of the federal powers or functions.<sup>4</sup>

<sup>1</sup>Inhabitants of Worcester v. The Western R. R. Co., 4 Met. 564; S. C. 1 Am. R. W. Cases, 350, 352, 353, 354; Boston & Me. R. R. Co. v. Cambridge, *supra*; Wayland v. Co. Comrs., *supra*; Charlestown v. Co. Comrs., *supra*; Comm. v. Lowell G. L. Co., *supra*; Railroad Co. v. Berks County, 6 Penn. St. R. 70; State v. Collr. of Middle Township, 38 N. J. 270, 13 Am. Ry. Rep. 47.

<sup>2</sup>Inhabitants of Worcester v. The Western R. R. Co., 4 Met. 564; S. C. 1 Am. R. W. Cases, 350, 354; Boston & Me. R. R. Co. v. Cambridge, *supra*; Wayland v. Co. Comrs., *supra*; Charlestown v. Co. Comrs., *supra*; Comm. v. Lowell G. L. Co., *supra*;

Railroad Co. v. Berks Co., 6 Penn. St. R. 70; State v. Collr. of Middle Township, 38 N. J. 270, 13 Am. Ry. Rep. 47.

<sup>3</sup>Thomson v. The Pacific R. R. Co., 9 Wall. 579; Union Pac. R. R. Co. v. Peniston, 18 Wall. 5; Union Pac. R. R. Co. v. Lincoln Co., 1 Dill. 314; Huntington v. Cent. Pac. R. R. Co., 2 Sawyer, 503; Western Union Tel. Co. v. City of Richmond, 26 Gratt. 1. And the same principle applies to its real estate situated within the taxing state; it is not exempt: People v. Central Pacific R. R. Co., 43 Cal. 398, 5 Am. Ry. Rep. 202.

<sup>4</sup>Railroad Company v. Peniston, 18 Wall. 5.

In the *Railroad Company v. Peniston*, the Supreme Court of the United States, STRONG, Justice, says that "exemption of Federal agencies from state taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect." That if not imposed on the right to exist, or perform the functions required of such agencies, or for which they were created, or upon any act required of them by the government, it is not an unlawful interference with the discharge of governmental powers.<sup>1</sup>

**5. If unconstitutional to create, it is so likewise to renew, an exemption.**—If it be unconstitutional for a state to invest originally a corporation, for railroad or other purposes, with exemption from taxation, then the renewal of an exemption of the kind which had once existed, and had thereafter ceased to exist, is equally objectionable in point of constitutionality. Therefore, where the franchise and property of a defaulting railroad corporation, being exempt from taxation, comes into the possession and ownership of the state, by purchase at judicial sale, for indebtedness to the state, and the same is, by authority of law, re-sold to a new and different corporation, it is holden that on the same becoming vested in the state, the exemption was extinguished, and that in the hands of the new corporate owners it is subject to taxation, in like manner as is other corporate property.<sup>2</sup>

**6. Ordinary method of taxation.**—The natural and more ordinary way of taxing railroad and other corporate interests of private corporations, originally was to tax the capital stock through the shares thereof. Their aggregate represents the whole value of the corporate franchise, entity and interest, whether real, personal or mixed, used in operating the enterprise; and when they

<sup>1</sup> 18 Wall. 36, 37; *People v. Central Pacific R. R. Co.*, 43 Cal. 398, 5 Am. Ry. Rep. 202. But a railroad bridge owned by the government, and used by a railroad company under a con-

tract or license, is exempt from taxation: *Chicago, Rock Island & Pac. R. R. Co. v. City of Davenport*, 51 Ia. 451.

<sup>2</sup> *Trask v. Maguire*, 18 Wall. 391.



are taxed, the whole corporate interest is taxed: for all such property as is servient to the road is merged in the corporate franchise, and is represented by the shares of capital stock, and their aggregate value is its aggregate value.<sup>1</sup>

When these are assessed at their par cash value, at the same *ratio* or *pro rata* of value as other interests are assessed, in relation to the par cash value of such other interests, then this is equal taxation before the law. Strictly speaking, there is no other taxable interest to be taxed as mere property, for all that which is known to the law as property is shorn of its property attributes, and merged in the franchise, by being worked into, or made servient to, the road. By this merger, it is dedicated to this particular use, which is *quasi* a public use, and does not remain, as before, capable of being used or sold, as other property ordinarily is, to every one and for every purpose. It is therefore only valuable for the use to which it is dedicated, for its original general attributes of property are gone. Its aggregated value then is, not what it originally cost, nor what its cash value would be if severed from the corporate franchise, but rather is indicated by the value of the enterprise, and the value of the latter is unerringly told by the aggregate value of the unwatered stock. It should be taxed, then, through the shares, as is still done in many of the states.<sup>2</sup>

There are two methods of effecting this: one is an assessment

<sup>1</sup> Whiting *v.* The City of Madison *et al.*, 23 Ind. 331, 335, 336; Rome R. Co. *v.* The City of Rome, 14 Geo. 275. In North Carolina it is held that, under the constitution of that state, the power of valuation of tangible property being vested in the township board of trustees, it is impossible for the General Assembly to confer the same upon the governor, treasurer and auditor: Richmond & Danville R. R. Co. *v.* Brogden, 74 N. Car. 707, 13 Am. Ry. Rep. 114; St. Louis, Vandalia & Terre Haute R. R. Co. *v.* Surrrell, 88 Ill. 535, 21 Am. Ry. Rep. 356. See, as to valuation of capital stock in Illinois, Porter *v.* Rockford, R. I. & St. L. R. R. Co., 76 Ill. 561. The assessment of property for taxation is not governed by any exact standard,

and that adopted by the assessors will be presumed correct until the contrary appears: Louisville & Nashville R. R. Co. *v.* State, 8 Heisk. 663, 19 Am. Ry. Rep. 107. Assessors need not hear evidence to ascertain the valuation; and so with a board of equalization: St. Louis, Vandalia & Terre Haute R. R. Co. *v.* Surrrell, 88 Ill. 535, 21 Am. Ry. Rep. 356.

<sup>2</sup> See as to the status of capital stock under the revenue laws of Illinois: Quincy R. R. Bridge Co. *v.* Adams Co., 88 Ill. 615, 21 Am. Ry. Rep. 378. In Virginia, the shares are held not taxable under the statute: City of Richmond *v.* Daniel, 14 Gratt. 385. And see Farrington *v.* Tennessee, 95 U. S. 679.

against the corporation itself for the whole amount of its capital stock, which assessment the company pays, and deducts from the profits of the corporation, and thus diminishes the dividends *pro tanto*; the other is, to assess against the capital stockholders themselves, severally, the amount of the capital stock owned by them respectively.<sup>1</sup> The latter is said to be the proper mode to adopt in all cases where a contrary method is not required by law.<sup>2</sup>

Thus it is believed that the true principle is to tax the shares, as representing the whole interest or value. Thus where, by an act of the legislature incorporating a railroad company, the company were authorized to procure, purchase, and hold in fee simple, improve and use, for all purposes of business to be transacted on or by means of their road, lands and real estate, and to manage and dispose of the same as they might see fit, and such act declared that the capital stock of the company should be divided into shares, "to be holden and considered as personal estate," it was holden that the property in the company was converted, by legislative enactment, into personal estate, and was no longer taxable as lands, but was subject to taxation as personalty only, by taxing the shares of each shareholder in the locality of his residence.<sup>3</sup>

In Massachusetts the rule is, to tax the franchise upon the aggregate value of all the shares;<sup>4</sup> and dividends declared pay-

<sup>1</sup> *Conwell v. The Town of Connersville*, 15 Ind. 150; *King v. The City of Madison*, 17 Ind. 48; *Whitney v. the City of Madison and others*, 23 Ind. 331, 335.

<sup>2</sup> *Conwell v. The Town of Connersville*, 15 Ind. 150.

<sup>3</sup> *Bangor & Piscataquis R. R. Co. v. Harris*, 21 Maine R. 533, 1 Am. R. Way Cases, 131; *Tallman v. The Treasurer of Butler County*, 12 Iowa, 531; *The City of Davenport and others v. The Miss. & Mo. R. R. Co.*, 12 Iowa, 539. But see *The Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384; S. C. 2 Am. R. W. Cas. 552, where the ruling, under the statute of New York, seems to be to the con-

trary. And where, in the assessment, both real estate and personalty are included in the valuation, without distinction, before the valuation can be increased, the commissioners must obtain jurisdiction as to both: *Kansas Pacific Ry. Co. v. Russell*, 8 Kans. 558, 5 Am. Ry. Rep. 232.

<sup>4</sup> *Commonwealth v. Lowell Gas Light Co.*, 12 Allen, 75; *Commw. v. Hamilton Mfg. Co.*, *Id.* 298; *Hamilton Co. v. Mass.*, 6 Wall. 632; *Boston & Lowell R. R. Co. v. Commonwealth*, 100 Mass. 399; S. C. 1 Withrow, 633, 642, 643; *Porter v. Rockford, Rock Island & St. Louis R. R. Co.*, 76 Ill. 561; *State R. R. Tax Cases*, 92 U. S. 575.

able in the future, with interest, which are incorporated in new stock certificates of the old stock, and the old certificates called in, and payable in cash, at par, or in stock certificates, at the option of the company, are holden to substantially amount to so much increase in value of the capital stock represented by the shares, and to be a fit subject for inclusion in the amount of the aggregate value of the shares. The Supreme Court of that state hold the following language on the subject: "It is the aggregate value of all the shares, which must be taken as the value of the franchise for taxation; and it makes no difference that, by reason of privileges more or less permanently attached to some of the shares, there is a difference in the market value. If this was in the form common in some states, of preferred stock, it would then go in at its market value, with the common stock at its value, to make the aggregate. \* \*

\* It is an element which must be included in ascertaining the value of the franchise."<sup>1</sup>

And under a statute of Iowa, requiring that railroad and other corporate interests should be taxable through the shares of capital stock, it is holden that during the existence of such law, such manner of taxation was the only method of taxing railroad interests by law; and that to tax also any part of the property, real or personal, which was actually servient to the franchise, as necessary for the carrying on of the same, was illegal, and would amount to double taxation.<sup>2</sup>

Of course, the *pro rata* of the real value in the market of a share of stock, under this system, should be the same, in assessing, as in reference to money, property, and other taxable interests. No more should be assessed against \$100 value of capital stock, of market value, than against the same value in money.

<sup>1</sup> 100 Mass. 404.

<sup>2</sup> *City of Davenport and others v. The Miss. & Mo. R. R. Co. and others*, 12 Iowa, 539. Under the Alabama Revenue Law of 1868, two distinct systems of assessment are provided, —one of general subjects of taxation, to be made by the assessor, the other of railroads and their rolling stock, to be made by the auditor; therefore the assessor can not assess railroads

or rolling stock. The act provides for an assessment for state taxation alone, and under it property can not be assessed for county taxes. After equalization of the assessment by the county board, the county commissioners levy a tax on the state assessments for county purposes. Thus the state taxes alone are assessed, the county taxes are only levied: *Perry County v. Selma, Marion & Memphis R. R.*

Where, by law, taxation of railroad interests represented by the capital stock of the company, is thus required to be by taxing the shares of such stock, it is competent for the legislature of the state wherein the road is situated to tax alike, through the corporation, and collect the same of it, all the shares thereof, whether holden by domestic or by non-resident shareholders. Were it not so, then that portion of the corporate interest holden by persons residing abroad, although its source of value and very foundation of existence is situate in and protected by the laws of such state, would remain untaxed, and would contribute nothing to the maintenance of the state. This is still the more just view when we consider that, by such law allowing taxation through the shares only, that which is otherwise real estate—the lands of the company holden for the purposes of the franchise—are not subject to taxation, and would not be reached, they being treated as personalty under the statute, for taxable purposes.<sup>1</sup>

In the case of *Minot v. The Philadelphia, Wilmington & Baltimore Railroad Company* and others, the Supreme Court of the United States lay it down as law that the state may lawfully tax the corporation itself, as something of some value, the measure of which may be estimated by reference to the aggregate value of its capital stock; and that such is not a tax upon the individual stock or interest of the stockholder. That court say,

Co., 58 Ala. 546, 20 Am. Ry. Rep. 372. The clauses in relation to the assessment of property which has escaped taxation, have no application to such cases: *Ibid.* Under an act subsequently declared to be unconstitutional, the state auditor instructed the collector of Perry county not to collect taxes from a railroad company for a certain year, which was obeyed. It was held not binding on the officer, and that the company was liable to pay the tax: *Ibid.* In Illinois, the rolling stock and track of railway companies must be assessed for taxation by the state board of equalization, but all other railroad property is assessed by local assessors, and the state board (except as a board of equalization) has nothing to do with

its valuation: *Chicago, Burlington & Quincy R. R. Co. v. Siders*, 88 Ill. 320, 21 Am. Ry. Rep. 304. Whether the valuation of railroad property is represented solely in the valuation of its tangible property, or in the valuation of that and its stock, will not be regarded as evidence of unjust discrimination: *Ibid.* The board may increase the valuation returned by officers of the company, without hearing any evidence to impeach the return: *St. Louis, Vandalia & Terre Haute R. R. Co. v. Surrall*, 88 Ill. 535, 21 Am. Ry. Rep. 356.

<sup>1</sup> *Faxon v. McCosh*, 12 Iowa, 527. But see *Comm. v. Chesapeake & Ohio R. R. Co.*, 27 Gratt. 344, 17 Am. Ry. Rep. 126.

that in such case "the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature" was "at liberty to adopt."<sup>1</sup>

That court add, moreover, in the same case, by way of illustration, that a state "may impose taxes upon" a "corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property"; and that the manner of arriving at its value, as well as the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion.

In the same connection the court lay down the law (as holden in 12 Iowa, 339, above cited), that although "the power of taxation of every state is necessarily confined to subjects within its jurisdiction," yet if the charter provide for taxation of the shares at the locality of the company or corporation, such shares may be there taxed through the corporation as shares, by requiring it to withhold the amount from the annual dividends, notwithstanding a portion or even all the shares of capital be owned by persons residing outside of the limits of the state.<sup>2</sup>

But a railroad company can not be taxed as for the amount of a mortgage or mortgages given and owing by itself to non-resident mortgagors, as a tax against the company. It is only liable to pay taxes on what it owns, and not on what it owes to, or what belongs to, others.<sup>3</sup> Nor can such mortgage interests, if belonging to non-residents, be taxed to such non-residents by the state wherein the mortgaged estate is situate; for a mortgage, being personal property, or a mere personal interest, or chose in action, attaches to the person of the owner wherever he be, and is therefore not property within the state, and by it is not subject to taxation.<sup>4</sup>

<sup>1</sup> 18 Wall. 206, 231.

<sup>2</sup> 18 Wall. 206, 229, 230, 231.

<sup>3</sup> Story's Confl. of Laws, sec. 379; Angell & Ames on Corpsns., sec. 485; City of Davenport v. Miss. & Mo. R. R. Co., 12 Ia. 539, 547; Murray v.

City of Charleston, 96 U. S. 432; Kirtland v. Hotchkiss, 100 U. S. 491; Comm. v. Ches. & Ohio R. R. Co., 27 Gratt. 344.

<sup>4</sup> City of Davenport and others v. The Miss. & Mo. R. R. Co., 12 Iowa,

In Missouri, the principle has been to tax railroads through the shares of stock; and it is there held that the railroad grant lands ceded to railroad companies by Congress and the state legislature to aid in the construction of their roads, are not taxable as such in the respective counties where situated, but are included in the taxation paid upon the shares of stock under the revenue law of said state of 1852; and that to tax these lands in kind would, *pro tanto*, amount to double taxation, and was not allowable.<sup>1</sup>

In Missouri it is held that, under the statutes of that state, the personal property of a railroad company which has a local *situs*, separate from the personal residence of the owner, is to be taxed in the county where it has such actual *situs*, and is not there temporarily.<sup>2</sup> But this principle (says the court) can not apply to rolling stock of the corporation, which is only in a county during transit, or when temporarily detained there to receive or discharge freight.<sup>3</sup> For taxation of the latter, under

539, 547; Story's Conf. of Laws, sec. 379; Angell & Ames on Corps., sec. 485. The state will be held to have waived its lien for taxes, as to subsequent mortgagees, by authorizing the railroad company to make bonds and mortgages, and by enabling acts containing no intimation that the priority of the lien for taxes was to be preserved: *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush, 673, 18 Am. Ry. Rep. 221.

<sup>1</sup> *State v. Hannibal & St. Joe R. R. Co.*, 37 Mo. 265; *Hannibal & St. Joe R. R. Co. v. Shacklett*, 30 Mo. 550.

<sup>2</sup> *Pacific R. R. Co. v. Cass Co.*, 53 Mo. 17. And see *Porter v. Rockford*, *Rock Island & St. Louis R. R. Co.*, 76 Ill. 561; *Irvin v. New Orleans*, *St. Louis & Chicago R. R. Co.*, 94 Ill. 105; *City of Dubuque v. Illinois Central R. R. Co.*, 39 Ia. 56, 8 Am. Ry. Rep. 496; S. C. in 20 Am. Ry. Rep. 124, overruling *City of Davenport v. Miss. & Mo. R. R. Co.*, 16 Ia. 348. The provision of the city charter of Buffalo, that goods and chattels upon lands shall be deemed to belong to

the owner of the lands, does not apply to the property of a person not liable for the tax, transiently upon the land, but in use by the owner: *Lake Shore & Mich. Southern Ry. Co. v. Roach*, 80 N. Y. 339; S. C. 1 Am. & Eng. R. R. Cas. 184. Such property, when taken by the collector under his warrant, may be replevied by the owner, notwithstanding the statute require an affidavit that property about to be replevied is not taken for a tax. In such a case, the property is not taken for a tax against the owner: *Ibid.* But it can not be shown in such case that the ostensible owner of the land is not the real owner: *Ibid.*

<sup>3</sup> *Pacific R. R. Co. v. Cass County* and others, 53 Mo. 17. See, also, to the same point, and like rulings, *Sangamon & Morgan R. R. Co. v. Morgan County*, 14 Ill. 163; *Hays v. Pacific Mail Steam-ship Co.*, 17 How. 596; *City of Sacramento v. Cal. Stage Co.*, 12 Cal. 134; *People v. Niles*, 35 Cal. 282; *Orange & Alexandria R. R. Co. v. City Council of Alexandria*, 17

the laws of Missouri, the corporation is treated as having its residence at its principal place of business offices; and at such place the rolling stock is taxable, as following the person and residence of the owner.<sup>1</sup>

The statute of Wisconsin exempting from taxation, other than that levied by a percentage of income of the company, the track, right of way and other property of railroad companies necessarily used in operating their roads, is held not to include hotels or eating houses run or kept by a lessee or lessees of the railroad company for the accommodation of passengers, whereat all others wishing to become guests thereof are accustomed to be received and entertained.<sup>2</sup> *Semble*, however, that if kept by railroad companies themselves, for the exclusive accommodation of employes and passengers, the ruling would be otherwise.<sup>3</sup>

Where the tax is not illegal, or the valuation excessive, its collection will not be restrained by injunction because of irregularities in the assessment.<sup>4</sup>

Gratt. 176. The company operating the road is liable to be taxed upon all rolling stock used upon the road, whether they are or are not owners of the road, or of the rolling stock so taxed, and hence are liable for taxes assessed upon sleeping cars owned and furnished by others, but so used upon the road: *Kennedy v. St. Louis, Vandalia & Terre Haute R. R. Co.*, 62 Ill. 395, 7 Am. Ry. Rep. 346.

<sup>1</sup> *Pac. R. R. Co. v. Cass Co.*, *supra*; *Dubuque v. Ill. Cent. R. R. Co.*, *supra*; *Appeal Tax Court v. Western Md. R. R. Co.*, 50 Md. 274; *Phil. Wilm. & Balt. R. R. Co. v. App. Tax Ct.*, *Id.* 397; *Appeal Tax Ct. v. N. Cent. Ry. Co.*, *Id.* 417. And where the company is created by the laws of another state, the *situs* of such property, for the purpose of taxation, is that of the property of the manager or agent in whose possession it is; in contemplation of law it is his: *Dubuque v. Ill. Cent. R. R. Co.*, *supra*. See note on these cases *post*, subdn. 21—Taxation by Municipal Corporations.

<sup>2</sup> *The Mil. & St. Paul Ry. Co. v.*

*Board of Supervisors, of Crawford County*, 29 Wis. 116; *Same v. City of Milwaukee*, 34 Wis. 271. But see *Osborn v. Hartford & New Haven R. R. Co.*, 40 Conn. 498, 5 Am. Ry. Rep. 226; *State v. Balt. & Ohio R. R. Co.*, 48 Md. 49; *Erie Co. v. Erie & W. Trans. Co.*, 87 Penn. St. 434.

<sup>3</sup> *The Mil. & St. Paul Ry. Co. v. Board of Supervisors of Crawford County*, 29 Wis. 116; *Same v. City of Milwaukee*, 34 Wis. 271. After recovering for taxes for particular years, the Commonwealth can not maintain another action to recover a balance for those years: *Newport & Cincinnati Bridge Co. v. Douglass*, 12 Bush, 673, 18 Am. Ry. Rep. 221. In Kentucky, on judgments recovered by the commonwealth in actions prosecuted by the attorney-general, two per cent. is to be taxed as costs: *Ibid.* And where an additional suit is prosecuted to satisfy the judgment, the two per cent. should be again taxed as costs upon the amount realized therein.

<sup>4</sup> *Kansas Pacific Ry. Co. v. Russell*, 8 Kans. 558, 5 Am. Ry. Rep. 232.

**7. Tax upon gross receipts.**—A state tax upon the gross receipts and earnings of railroad companies is not unconstitutional, as tending to interfere with the commerce among the states, nor as a violation of the provision of the federal constitution which inhibits the states from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. Such method of taxation is valid, although the receipts and earnings be in part from freights transported into or out of the state, into or out of another state, or through one or more states, into one or more other states.<sup>1</sup>

**8. Power of county to tax in unorganized attached county.**—The annexation of an unorganized territory or county to an organized county by legislative enactment, "for judicial and revenue purposes," carries with it the right of the county to which the unorganized territory or county is so attached, to levy and collect taxes therein, the same as in its own more restricted limits; and it therefore follows that where a tax on a railroad is otherwise legal, it may be levied and collected of such railroad in such unorganized county, in like manner as in the organized county.<sup>2</sup>

**9. National taxation of railroad stock dividends and mortgage interests.**—Income tax on railroad dividends, under the act of Congress of 1864, and amendatory acts, is held to be assessable for the year in which the dividends are made payable;

Taxes may be recovered by an ordinary action at law, notwithstanding the legislature may have provided a special remedy, unless a contrary intention clearly appears: *City of Dubuque v. Illinois Central R. R. Co.*, 39 Ia. 56, 20 Am. Ry. Rep. 124. And it is too late to make such objection in the supreme court: *Ibid*; *Perry Co. v. Selma, Marion & Memphis R. R. Co.*, 58 Ala. 546. 20 Am. Ry. Rep. 372. But a county is not exempt from the operation of statutes of limitation. In Alabama, however, there is no provision applicable to such a claim, and there is no bar but the presumption of payment arising from the lapse of time—not less than twenty years: *Per-*

*ry Co. v. S., M. & M. R. R. Co.* And an acquiescence by a commissioner's court in an unconstitutional act remitting taxes assessed against a railroad company, is no surrender of the claim, or bar to its assertion: *Ibid*.

<sup>1</sup> *Reading R. R. Co. v. The State of Pennsylvania*, 15 Wall. 234; *Balt. & Ohio R. R. Co. v. Maryland*, 21 Wall 456.

<sup>2</sup> *Union Pacific R. R. Co. v. Lincoln County*, 1 Dillon's C. C. R. 314; *Union Pac. R. R. Co. v. Peniston*, 18 Wall. 5. And a law providing for the collection of state taxes in the unorganized counties themselves, is valid: *Francis v. Atchison, Topeka & Santa Fe R. R. Co.*, 19 Kans. 303, 19 Am. Ry. Rep. 20.



hence dividends declared in December, 1869, but payable in January, 1870, were properly liable to income tax for 1870, the year in which they were payable, and not for 1869, the year in which the earnings accrued. The Circuit Court of the United States say, *STRONG*, Justice: "the duty arises when the dividend is payable." That the act of Congress "seems to contemplate a tax upon income received or receivable, something out of which the tax can be paid." That "if it were not so, the tax might be exacted for that which never came, and never could come, into the hands of the taxpayer."<sup>1</sup>

"Interest certificates," so called, and being certificates made payable to the stockholders out of the future earnings of the roads, and at the pleasure of the company, and bearing dividends, are a "dividend in scrip," within sec. 22 of Int. Rev. Act of June 30, 1864, as amended, and as such are amenable to taxation thereunder.<sup>2</sup> In order to determine this question, evidence from the reports of the company, and from those of a company with which it became consolidated, is allowable, to show the payment of dividends on the certificates.<sup>3</sup>

Covenants in a railroad mortgage, on the part of the company, to pay a stipulated annual interest on the bonds thereby secured, without defalcation or diminution on account of or for any tax or taxes imposed upon or collected from the company, do not oblige the company to reimburse to the bondholder, or to pay, the income percentage imposed upon the income of the bondholder, or holder of coupons, required by the act of Congress in relation to revenue to be withheld by the company and paid to the government, out of the interest payable to the holders of coupons. Such covenants bear relation exclusively to the usual undertakings between the parties to the mortgage. The tax, though collectible through the company, is an income tax on the holders of the coupons, and not upon the company.<sup>4</sup>

<sup>1</sup> *Philadelphia & Reading R. R. Co. v. Barnes*, 1 Withrow's Corp. Cas. 114, 124.

<sup>2</sup> *Bailey v. N. Y. Cent. R. R. Co.*, 22 Wall. 604, 11 Am. Ry. Rep. 121.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Haight v. The Railroad Co.*, 6 Wall. 15. For default under sec. 122 of the Internal Revenue Act of June 30, 1864, as amended July 13, 1866,

the penalty is one thousand dollars, as specially provided therein. The penalty of five per cent., and interest at one per cent. per month, applies only to defaults in the payment of duties on incomes, imposed by sec. 119, as amended: *Erskine v. Milwaukee & St. Paul Ry. Co.*, 4 Otto, 619, 16 Am. Ry. Rep. 154.

**10. Taxation for street improvements.**—An incorporated town or city having power by its charter to require of property holders abutting upon the public streets the making of sidewalks and street improvements in front of such property, has the same authority to compel a railroad company to thus improve the sidewalks and streets in front of its grounds as such city authorities have in that respect in reference to the grounds of natural persons abutting upon such public ways. The fact that the corporation is otherwise taxed for general purposes, does not avail to prevent the enforcement of a municipal regulation of such special character against it, or to exempt such corporation from like liability to make such improvements as attach to natural persons, who in like manner may have paid a general tax.<sup>1</sup>

But it is held that railroad companies are not liable to an assessment for paving a street in front of their depot and along their track, or for laying out a highway,<sup>2</sup> especially where there is no depot or stopping place on the street so improved.<sup>3</sup>

In New Jersey it is said that lands acquired for a public use by the exercise of the right of eminent domain, and which are essential for the purposes of the railroad, must be regarded, for purposes of taxation, as devoted to the public use.<sup>4</sup> In assessing such lands for local improvements, therefore, the increase in their market value can not be considered; if not benefited in their present use, the assessment must be made on a valuation depending on a probability that they may be converted to other uses.<sup>5</sup> When the property is legally subject to assessment, and the proceedings of the commissioners are regular, the report is conclusive, in the absence of other proof, of benefit received, and its amount and value.<sup>6</sup>

<sup>1</sup>The Burlington & Mo. River R. Co. v. Spearman, 12 Iowa, 112; Peru & Indianapolis R. R. Co. v. Hanna, 68 Ind. 562; Troy & Lansingburgh R. R. Co. v. Kane, 9 Hun, 506.

<sup>2</sup>City of Bridgeport v. New York & New Haven R. R. Co., 36 Conn. 255; New York & New Haven R. R. Co., & Short Line Ry. v. City of New Haven, 42 Conn. 279. 1 Am. Ry. Rep. 162. And see Junction R. R. Co. v.

City of Phil., 88 Penn. St. 424; New York & Harlem R. R. Co. v. Morrisania, 7 Hun, 652; London, B. & S. C. Ry. Co. v. St. Giles, Law Rep., 4 Exch. Div. 239.

<sup>3</sup>State v. Newark, 2 Dutch. 519.

<sup>4</sup>State v. Jersey City, 36 N. J. Law, 56, 12 Am. Ry. Rep. 302; S. C. 42 N. J. 97, 1 Am. & Eng. R. R. Cas. 406.

<sup>5</sup>State v. Jersey City.

<sup>6</sup>State v. Jersey City, 42 N. J. 97.

11. **Taxation of railroad grant lands.**—In the *Burlington and Missouri River Railroad Company against Hayne*, Treasurer of Wapello county, the Supreme Court of Iowa hold (what indeed never was disputed) that lands granted by United States in aid of the construction of railroads in Iowa, under the act of Congress of the 15th of May, 1856, are taxable as the property of, and in the hands of, such railroad companies, whenever the legal title in fee is unconditionally vested in those companies.<sup>1</sup> The real point raised by the pleadings was, their liability to taxation before the end of the ten years allowed for reverting to the United States, in case of failure to complete the road within that time, and when in fact the road was not yet completed. The (supposed) agreement in court, although the counsel, and the only one, for the company, the writer never knew anything of until he saw it referred to in the reported opinion of the court.

In *Union Pacific Railway Co. v. McShane*<sup>2</sup> it was held, overruling on this point *Kansas Pacific Railway Co. v. Prescott*,<sup>3</sup> that the contingent right of pre-emption in lands granted to the Pacific Railroad Company, did not constitute an exemption of those lands from state taxation; and it was further held, in conformity with the latter case, that lands on which a patent has not issued, are exempt; but when the patent issues, the liability to taxation arises, irrespective of any question of the payment of costs.<sup>4</sup> The same principle underlies a decision in Iowa, that where the governor is directed by statute to certify to railroad companies lands held by the state in trust for their benefit, they became then, by force of the statute merely, invested with the legal title thereto, and subject to taxation

<sup>1</sup> *Burlington & Mo. River Railroad Co. v. Hayne*, 19 Iowa, 137; *Central Pacific R. R. Co. v. Howard*, 52 Cal. 227, 20 Am. Ry. Rep. 111; *Wisconsin Cent. R. R. Co. v. Taylor Co.*, 52 Wis. 37; S. C. 1 Am. & Eng. R. R. Cas. 532.

<sup>2</sup> 22 Wall. 444; S. C., 11 Am. Ry. Rep. 456.

<sup>3</sup> 16 Wall. 603.

<sup>4</sup> And see *Central Pacific R. R. Co. v. Howard*, 51 Cal. 229, 12 Am. Ry. Rep.

98; and S. C. in 52 *Id.* 227, 20 Am. Ry. Rep. 111. In these cases it is said that such lands are not taxable until the conditions of the grant are complied with, and the company has become entitled to a patent; but that if the company has become vested with a perfect equitable title, leaving only a bare legal title in the United States, the land is taxable. See also, *Wis. Cent. R. R. Co. v. Taylor Co.*, *supra*.

thereon.<sup>1</sup> But in Iowa it is also held that such granted lands become taxable upon being earned by the company, notwithstanding the legal title still remains in the government;<sup>2</sup> but this rule is not applicable when there are obstacles preventing the government from granting a clear title, such as undetermined homestead entries on the land.<sup>3</sup>

**12. Inter-state taxation.**—The stocks and bonds of a railroad corporation are not only subject to taxation in the state wherein such railroad company exists and exercises its franchise, but when a railroad company becomes inter-state in its character, and exercises its functions, and operates its road, in two or more states, the stock and bonds thereof are liable to taxation, according to the ruling in Pennsylvania, in each of such states, in proportion to the amount or value of road in such states respectively.<sup>4</sup> And such taxes may be collected off the railroad company, if the statute law so provides, and be recouped or withheld by the company out of the dividends and interest coupons payable by the company.<sup>5</sup> But this ruling is peculiar to Pennsylvania, and does not prevail elsewhere.<sup>6</sup>

But such bonds may not be taxed by state authority when payable at a place out of the state assuming to tax the same, and issued to, or held by, persons not residents of the state in which such tax is levied; and a law of a state requiring a railroad company to withhold a *per centum* of the interest payable on such bonds, and going to non-residents, and to pay over the

<sup>1</sup> *Sioux City & St. Paul R. R. Co. v. Osceola Co.*, 43 Ia. 318, 14 Am. Ry. Rep. 450; *C. P. R. R. Co. v. Howard*, 52 Cal., *supra*.

<sup>2</sup> *Iowa Homestead Co. v. Webster Co.*, 21 Ia. 221; *Chicago, Burlington & Quincy Ry. Co. v. Holdworth*, 47 Ia. 20.

<sup>3</sup> *Dickerson v. Yetzer*, 53 Ia. 681; S. C. 6 N. W. Repr. 41, 21 Am. Ry. Rep. 176.

<sup>4</sup> *N. Y. & Erie R. R. Co. v. Sabin*, 26 Penn. St. 242; *Commonwealth v. The Cleveland, Painesville & Ashtabula R. R. Co.*, 29 Penn. St. 370; *Del. & Hudson Canal Co. v. Comm.*, 43 Penn. St. 227; *Pittsburg, Fort Wayne*

*& Chi. Ry. Co. v. The Commonwealth*, 66 Penn. St. 73; S. C. 5 Am. R. 344; *Burlington & S. W. Ry. Co. v. Putnam Co.*, 5 Dill. 289.

<sup>5</sup> *Maltby v. Reading & C. R. R. Co.*, 52 Penn. St. 140; *Pittsburg, Fort Wayne & Chi. R. W. Co. v. The Commonwealth*, 66 Penn. St. 73; *Del., Lack. & Western R. R. Co. v. Comm.*, 66 Penn. St. 64; *Buffalo & Erie R. R. Co. v. Comm.*, 3 Brewst. 374.

<sup>6</sup> *Northern Cent. Ry. Co. v. Jackson*, 7 Wall. 262; *Murray v. City of Charleston*, 96 U. S. 432; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Comm. v. Ches. & Ohio R. R. Co.*, 27 Gratt. 344.

same to the state, as a tax upon such securities, or on the income or annual interest accruing thereon, is void for want of jurisdiction of the state over the subject-matter, which is property beyond its confines, and also void as impairing the obligation of the contract, under color of levying and collecting a tax.<sup>1</sup>

The Supreme Court of the United States, in the case cited here from 15 Wallace, *STRONG*, Justice, use the following language in disposing of this subject: "The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretense of levying a tax, commands the company to withhold a portion of the stipulated interest, and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties."<sup>2</sup>

In the same connection the court reiterate the principle that the obligation of a contract depends upon its terms, and the means which the law, in existence at the time, affords for its enforcement, and that a law altering the terms of a contract by imposing new conditions, or by dispensing with those expressed, is a law which impairs its obligation; and that forasmuch as it directs, as did the law in that case, the treasurer of the company to retain a portion of the interest stipulated to be paid to the

<sup>1</sup>Case of the State Tax on Foreign-held Bonds—*Cleveland, P. & A. R. R. Co. v. The State of Pennsylvania*—15 Wall. 300; *Murray v. Charleston*, 96 U. S. 432; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Comm. v. Chesapeake & Ohio R. R. Co.*, 27 Gratt. 344, 17 Am. Ry. Rep. 126. And so a boat belonging to a railroad corporation of one state, and owned and kept in such state, but used to transport passengers or freight across a river into another state, is not taxable as property within

such other state, although registered therein under the registry laws of the government. It is not property situate within such latter state: *State of New Jersey, Erie R. R. Co. and Nathaniel Marsh, prosecutors, v. Haight, 1 Vroom* (N. J.), 428.

<sup>2</sup>*Railroad Co. v. State of Pennsylvania*, 15 Wall. 300, 320. See *State Railroad Tax Cases*, 92 U. S. 575; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Porter v. Rockford, Rock Island & St. Louis R. R. Co.*, 76 Ill. 563.

bondholders, and to pay the same into the treasury of the state, it thereby assumed to disregard the express provisions and obligations of the contract existing between the company and its creditors, and that "it is a forced contribution levied upon property held in other states."<sup>1</sup>

Nor does it alter the principle that the bonds or credits holden by or due to a non-resident of the state which assumes to tax the same, are secured by a mortgage of record, and covering property situated in such state; it is not the mortgage, but the bond, which is the basis of the debt and of the property, and the mortgage, though property, is but the lien given as security for the payment of the bond, and follows the same as incident thereto. True, a contrary doctrine was holden in Pennsylvania, in *Maltby v. The Reading & Columbia Railroad Company*; but in the case of *Railroad Company v. The State of Pennsylvania*, above cited, the Supreme Court of the United States advert to and review the *Maltby* case, and repudiate the same as authority. In that respect, the Supreme Court of the United States say: "A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides," and that "when held by a non-resident it is as much beyond the jurisdiction of the state as the person of the owner."<sup>2</sup>

The Iowa Supreme Court, in the case cited from 12th Iowa, where the question arose whether mortgages held by non-residents of Iowa, upon Iowa property, could be taxed by a law of that state, say: "Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the state, but the mortgage itself being personal property, a chose in action, attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the

<sup>1</sup> 15 Wall. 320, 321. The rulings in this and kindred cases by the United States Supreme Court, must effectually settle the question involved, whatever rulings there may be of the state

courts to the contrary.

<sup>2</sup> *Railroad Co. v. Pennsylvania*, 15 Wall. 322, 323; *Davenport v. Miss. & Mo. R. R. Co.*, 12 Iowa, 539; *Kirtland v. Hotchkiss*, *supra*.

state. If so, and the property in the mortgage attaches to the person of the owner, it follows, that these mortgages are not property within the state, and if not, they are not the subject of taxation."<sup>1</sup>

Nor can freights transported into or out of any state, from or into another state, be subjected to taxation in their transit, or by reason thereof, by either of such states. Such tax is an unwarranted interference with the commerce between the several states, which, under the constitution, is exclusively within the control of the Congress of the United States, and subject to its regulation.<sup>2</sup> And the same constitutional inhibition applies to a tax imposed upon passengers.<sup>3</sup>

And so a law imposing a tax upon bills of lading for property transported from one state to another, is substantially a tax upon the transportation itself, and as such is unconstitutional, as assuming to regulate or interfere with commerce between the states.<sup>4</sup>

In the case cited from 15 Wallace (the case of the state freight tax), which grew out of an effort of the state of Pennsylvania to levy a tax upon all freights passing over her railroads, canals and rivers, or other means of transportation, the Supreme Court of the United States say, STRONG, Justice: "if one state can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between states remote from each other may be destroyed. The produce of Western states may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that

<sup>1</sup> Davenport v. The Miss. & Mo. R. Co., 12 Iowa, 539.

<sup>2</sup> Case of the State Freight Tax, 15 Wall. 282; State v. Carrigan, 10 Vroom, 35. But a provision of a city ordinance requiring every railroad or express company doing business within the city, and having a business extending beyond the state, to pay an annual license, is not repugnant to this provision of the constitution: Osborne v. City of Mobile, 16 Wall. 479,

4 Am. Ry. Rep. 364; San Jose v. San Jose & S. C. R. R. Co., 53 Cal. 475.

<sup>3</sup> Clarke, Treasurer of Delaware, v. The Phila., Wilmington & Balt. R. R. Co., 4 Houst. (Del.), 158; S. C. 6 Am. Ry. Rep. 7; Crandall v. State of Nevada, 6 Wall. 35, 44.

<sup>4</sup> Almy v. The State of California, 24 How. 169; Crandall v. Nevada, 6 Wall. 35, 42; Woodruff v. Parham, 8 Wall. 123.

the power regulating commerce among the states was conferred upon the Federal government.”<sup>1</sup>

And so, we may add, of the converse of the proposition—that if, instead of an inhibition by unbearable taxation, transportation companies and carriers be required, under a governmental pretense of regulating freights and charges for the transportation of property and persons, to carry for certain prescribed rates, or to carry in all cases for the government, the power may be so exercised, by requiring services to be rendered for insufficient compensation, as, on the other hand, to totally destroy these organizations, and all means of transportation, and thereby, in a great measure, break up all commerce between the different states; hence the states may neither meddle the one way nor the other therein.

But a state law taxing the earnings of a railroad company or carrier, is not unconstitutional as interfering with commerce among the states, although such earnings consist in part of moneys received for the inter-state transportation of persons or property carried out of or into such state, into or from another state.<sup>2</sup>

In the case here cited from 15 Wall. 284, the Supreme Court of the United States say, STRONG, Justice: “The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury.”<sup>3</sup> In short, the tax is on the money of the company arising from the exercise of its franchise, and is imposed thereon in lieu of on the specific property or franchise, as may be lawfully done; and the term earnings, or gross receipts, or whatever term be used, is only the means of identifying the amount to be taxed.<sup>4</sup>

<sup>1</sup> 15 Wall. 280; *Clarke, Treasurer of Delaware, v. Phila., Wilmington & Balt. R. R. Co.*, 4 Houst. 158; S. C. 6 Am. Ry. Rep. 7.

<sup>2</sup> *State Tax on Railway Gross Receipts*, 15 Wall. 284; *State v. Am. Exp. Co.*, 7 Biss. 227; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *State v. Cumberland & P. R. R. Co.*,

40 Md. 22.

<sup>3</sup> *State Tax on Railway Gross Receipts*, 15 Wall. 294.

<sup>4</sup> *Ib.* 293. A company incorporated by the states of Illinois and Missouri, for the purpose of building a bridge across the Mississippi river, though afterwards consolidated, is held, in the former state, liable to be taxed



**13. Taxation of railroad companies on inter-state freights and passengers.**—A law of a state imposing a tax upon freights taken up within the state and carried out of it, or taken up outside the state and delivered within it—or, in other words, upon all freight other than that taken up and delivered within the state—is void for unconstitutionality, as being repugnant to that clause of the federal constitution which declares that “no state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.”<sup>1</sup> So, likewise, in regard to a tax on freights carried through a state to and from other states.<sup>2</sup>

So the states have no power to levy, impose or collect a tax upon passengers entering into, going out of or passing through their respective confines or territories; such tax is illegal, whether imposed directly upon the passenger, or indirectly by way of taxation of the railroad company, or other carriers, transporting such persons. The citizens of the United States are entitled to free ingress and egress into and from every state and territory, and all parts of the country which are subject to the national government; and, in the forcible language of the learned Justice MILLER, of the United States Supreme Court, “this right is in its nature independent of the will of any state over whose soil he must pass in the exercise of it.”<sup>3</sup>

**14. Not taxable in parcels.**—A railroad is an entirety, and can not be cut up and taxed and sold for taxes in parcels. Such a course would not only sacrifice the structure for a nominal price, as it could not in parcels be of its real relative value to a purchaser, but it would result in a destruction of the franchise,

there upon its capital stock: *Quincy R. R. Bridge Co. v. Adams Co.*, 88 Ill. 615, 21 Am. Ry. Rep. 378. And the act of May 1, 1873, the object of which was to declare such structures real estate for the purposes of sale for taxes, does not exempt the company from taxation upon their stock: *Ibid.*

<sup>1</sup> *Reading R. R. Co. v. The State of Pennsylvania*, 15 Wall. 232; *Erie R. W. Co. v. The State of Pennsylvania*, 15 Wall. 282; *Almy v. The State of California*, 24 How. 169. See, also, *State of*

*Indiana v. American Express Co.*, 7 Bissell, 227.

<sup>2</sup> *Reading R. R. Co. v. The State of Pennsylvania*, 15 Wall. 232; *Erie R. W. Co. v. The State of Pennsylvania*, 15 Wall. 282; *Almy v. The State of California*, 24 How. 169.

<sup>3</sup> *Crandall v. The State of Nevada*, 6 Wall. 35, 44; *Clarke, Treasurer of Delaware, v. The Phila., Wilmington & Balt. R. R. Co.*, 4 Houst. (Del.), 158; *S. C.* 6 Am. Ry. Rep. 7.

and would destroy its availability to the public, who are entitled to its benefits as a means of transportation.

The whole only, may be subjected to taxation or coercive severance. The Supreme Court of the state of Kentucky say: "Fragmentary taxations or sales might be unjustly vexatious and injurious to the owners, pervert the destination of the road, *and disturb the public use and interest*. To avoid such evils and absurdities, the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and can not be a fit subject for local taxation by the separate counties through which it runs."<sup>1</sup>

**15. Not taxable by county to pay subscription of such county to stocks in the road to be taxed.**—It is holden in Kentucky, and very justly too, as we conceive, that a railroad company can not be taxed, and its road is not liable to taxation, by a county, to raise money for the payment of the subscription of such county to the capital stock of the company; that if locally liable to be taxed for any purpose in parcels, yet it could not be taxed for such a purpose; and therefore, on application by bill, the enforcement thereof was perpetually enjoined.<sup>2</sup>

The Supreme Court of Kentucky, after laying down the rule that the road is an entirety, and could not be sold in parcels, say: "if a part of the road were subject to taxation for ordinary local purposes, it can not, to any extent, be liable for the county subscription *to itself for the purpose of completing its construction*. If liable for any portion of that subscription, it would, to that extent, pay the debt of the stockholders, or remit so much of the amount subscribed to itself, and, consequently, would get that much less than the subscription to it, or for its use. Then the object of the tax enjoined is inconsistent with the obligation of the county of Pendleton to pay a specific sum for stock in the railroad, to aid other stockholders to make and equip the road. To tax the road itself for that selfish purpose would be repudiation to the extent of the tax, and is not within the range of legitimate taxation for county purposes."<sup>3</sup>

<sup>1</sup> Applegate and others v. Ernst and others, 3 Bush, 648; S. C. 1 Withrow's Corp. Cas., 552, 553; State of Ga. v. Atlantic & Gulf R. R. Co., 3 Woods, 434.

<sup>2</sup> Applegate and others v. Ernst and others, 3 Bush, 648; S. C. 1 Withrow's Corp. Cas., 552.

<sup>3</sup> *Ib.* 648; and S. C. 1 Withrow's Corp. Cas., 552, 553.

**16. How taxation is affected by consolidation or sale.**—The consolidation of two or more railroads and companies into one united line and one company, by authority of law, with no provision to the contrary, leaves the several parts of the new line which are respectively composed of the several old ones, subject to the same rule of taxation and liability, and entitled to the same exemptions, which such old ones were respectively subject or entitled to before the act of consolidation was completed. That portion of the new line which was exempted before, is exempted still, and that which before was liable, is liable still, in the same manner and extent as before;<sup>1</sup> and the same is true as to a sale of the road.<sup>2</sup>

**17. Double taxation.**—Taxing the property of a railroad corporation as against the company, and then again taxing the shares of stock as against the individual stockholders, is double taxation, and as such is illegal.<sup>3</sup> To avoid such unequal and illegal taxation, in the state of Maine, the statutory rule there is for the assessor to assess the corporation for all its machinery, goods and real estate, in the town or place where situated or employed, and then to assess the stockholders there resident for their shares of stock therein, deducting therefrom their proportion of the value of the property so assessed to the corporation.<sup>4</sup>

Double taxation is not permissible in law; the burdens of

<sup>1</sup> *Phila. & Wilmington R. R. Co. v. Maryland*, 10 How. 376, 1 Am. R. Way Cases, 21; *Tomlinson v. Branch*, 15 Wall. 460; *City of Charleston v. Branch*, 15 Wall. 470; *Minot v. The Phila., Wilmington & Baltimore R. Co.*, and others, 18 Wall. 206; *Bailey v. N. Y.-Cent. R. R. Co.*, 22 Wall. 604, 11 Am. Ry. Rep. 121; *Central R. R. & Banking Co. v. Georgia*, 2 Otto, 665; *Branch et al. v. City of Charleston*, 2 Otto, 677; *Chesapeake & Ohio R. R. Co. v. State of Va.*, 4 Otto, 718, 16 Am. Ry. Rep. 155; *State v. Woodruff*, 36 N. J. Law, 94, 12 Am. Ry. Rep. 424; *Mich. S. & N. Ind. R. R. Co. v. The Auditor General*, 9 Mich. 448.

<sup>2</sup> *Knoxville & Ohio R. R. Co. v.*

*Hicks*, 1 Tenn. Leg. Repr. 338, 15 Am. Ry. Rep. 197 (Supreme Ct. Tenn., Sept. term, 1877). And where such sale is made by authority of an act of the legislature, the state is estopped from questioning its validity; *Ibid*.

<sup>3</sup> *Cumberland Marine Railway Co. v. City of Portland*, 37 Maine, 444.

<sup>4</sup> In the case above cited, it is held that such method is not subject to the objection of double taxation. Under a former statute of that state, the property of corporations was deemed personal estate, and was held to be taxable only as such: *Bangor & Piscataquis R. R. Co. v. Harris*, 21 Maine, 533; *State v. Hannibal & St. Jos. R. R. Co.*, 37 Mo. 265; *Hannibal & St. Jos. R. R. Co. v. Shacklett*, 30 Mo. 550.

government must be equally distributed or imposed upon all. Hence, an intention of the legislative department to resort to it will not arise by inference.<sup>1</sup> Therefore, where, by law, all the property of a specified corporation is taxed in a particular manner, as, for instance, upon its capital stock, which represents its whole property and interests, and no design is intimated in the law to subject it to further taxation, it will be intended that the taxing power is satisfied or exhausted by the particular tax provided for, and judicial implications may not add other burdens which the legislative authority has failed to impose.<sup>2</sup>

**18. Voluntary payment of tax.**—A tax voluntarily paid, with full knowledge of all the circumstances in regard to it, and without protest or objection at the time of payment, can not be recovered back, however unjust or wrongful the same may have been. To enable the company to sue for and recover it back, it must be paid under protest.<sup>3</sup> Such is the general doctrine, as well in reference to the acts of individuals, as corporations. It is not like a payment made by mistake, misrepresentation or concealment.<sup>4</sup> And the same rule applies to the voluntary payment of a tax assessed in aid of a railroad, or to pay for a subscription, by a taxpayer who neglects to enjoin its payment to the company.<sup>5</sup>

**19. Taxation of taxable assets as shown by dividends.**—In Pennsylvania, the rule is to tax the corporation a certain percentage upon the amount or value of its taxable assets, which is to be determined by the amount declared as dividends—that is, cash dividends of earnings or produce of the roads, and not stock dividends of shares created by subdivision of former shares, without any increase of the actual capital of the company, or any actual increased value or interest passing to the stock-

<sup>1</sup> *New York & Erie R. R. Co. v. Sabin*, 26 Penn. St. (2 Casey), 242; *Osborn v. New York & New Haven R. R. Co.*, 40 Conn. 491, 5 Am. Ry. Rep. 218.

<sup>2</sup> *N. Y. & E. R. R. Co. v. Sabin*, *supra*; *Hannibal & St. Jos. R. R. Co. v. Shacklett*, 30 Mo. 550; *State v. Hannibal & St. Jos. R. R. Co.*, 37 Mo. 265. But see *Orange & A. R. R. Co. v. City of Alexandria*, 17 Gratt. 176;

*Dunleith & D. Bridge Co. v. City of Dubuque*, 32 Ia. 427.

<sup>3</sup> *New York & Harlem R. R. Co. v. Marsh*, 12 N. Y. (2 Kernan), 308; *County of Cook v. The Chi., Burlington & Quincy R. R. Co.*, 35 Ill. 460.

<sup>4</sup> *N. Y. & Harlem R. R. Co. v. Marsh*, 12 N. Y. (2 Kernan), 308; *Cook County v. Chicago, Burlington & Quincy R. R. Co.*, 35 Ill. 460.

<sup>5</sup> *Butler v. Fayette Co.*, 46 Ia. 326.

holder by the operation of increasing the number of shares.<sup>1</sup> But the actual increased value and earnings that should ordinarily go into dividends, can not be converted into additional stock as stock dividends, and thus added to the capital of the company, and thereby avoid taxation. In such cases, the new shares will be deemed dividends of proceeds or earnings re-invested in capital, and will be estimated accordingly in fixing taxable values.<sup>2</sup>

And where the plan of taxation is to tax the excess of dividends over a certain per cent. of the capital of a railroad company, that capital is the actual paid-up stock of the company, and not the cost of the road, or sum total of paid capital and corporation indebtedness put together. And though, if a wrong basis of adjusting such tax shall be taken, and thereby, without fraud, but by mistake of rights, too small a tax is paid, and by reason thereof, the company become liable to make up the deficiency, yet on such deficiency interest is not recoverable, unless demand be made, and be followed by a refusal to pay such balance; but in case of such demand and refusal, interest runs from the day of the demand.<sup>3</sup>

If the tax be that of a certain per cent. upon the cost of a railroad and its appendages, to be shown by an annual report of such cost, it is assessable upon the cost of the road only, and not upon the road, rolling stock, equipments and movable effects; the term "railroad, with appendages," will not be construed to include movables.<sup>4</sup>

**20. Pro rata taxation, based on the length of the main line.**—Where, by law, railroad companies are taxable within the several counties, towns and cities, *pro rata*, in proportion as the length of the main track in each county, town or city bears to the whole length of the road, a road over which a company occasionally runs its trains, under a mere easement or license, is not any part of its main track, and an assessment of taxes on

<sup>1</sup>Commonwealth v. Pitts., Ft. Wayne & Chi. Ry. Co., 74 Penn. St. 83; Commonwealth v. Erie & Pitts. R. R. Co., 74 Penn. St. 94; S. C. 10 Phil. 465.

<sup>2</sup>Commonwealth v. Pitts., Ft. Wayne & Chi. Ry. Co., 74 Penn. St. 83; Commonwealth v. Erie & Pitts. R. R. Co., 74 Penn. St. 94; S. C. 10 Phil.

465.

<sup>3</sup>Second & Third Street Pass. R. W. Co. v. City of Phila., 51 Penn. St. 465. If there be concealment or design to mislead and withhold the amount, then interest will run for the whole time. *Ib.*

<sup>4</sup>State Treasurer v. The Somerville & Easton R. R. Co., 4 Dutch. 21.

the rolling stock of the company so using the road of the other, in the county where such road is situate, is illegal;<sup>1</sup> for the enjoyment of such easement does not confer upon the company enjoying it any vested interest in the road.<sup>2</sup>

If a tax be thus levied and collected of a railroad company by a county or municipal corporation, the company, if paid under protest, may recover the same back by an action against the county or municipality; or if property be seized as a means of collecting the money, then the company may maintain an action of trespass against all concerned in such seizure.<sup>3</sup> In such case, a remedy by injunction against the collection of the tax will not be given in equity, unless it be made to appear that the collection of the tax will be attended by an irreparable injury.<sup>4</sup>

In Illinois, the rule now is to ascertain the value of a railroad in the several counties or municipalities through which it passes, by first ascertaining the length and entire value of the whole road, and then fixing the value in each county at such proportion of the whole value as the length of road in such county bears to the length of the whole road. Such rule is held to be constitutional and just.<sup>5</sup> And the whole taxable value of the road and corporate interests for which it is to be assessed is arrived at, by

<sup>1</sup>County of Cook v. Chi., Bur. & Quincy R. R. Co., 35 Ill. 460.

<sup>2</sup>County of Cook v. Chi., Bur. & Quincy R. R. Co., 35 Ill. 460. But it is otherwise as to leased roads, where the charter of the company provides that upon acquisition in that manner, they shall be regarded as the property of the company; for purposes of taxation they will be so regarded: *Huck v. Chicago & Alton R. R. Co.*, 86 Ill. 352, 17 Am. Ry. Rep. 419.

<sup>3</sup>County of Cook and another v. The Chi., Bur. & Quincy R. R. Co., 35 Ill. 460.

<sup>4</sup>County of Cook and another v. Chi., Bur. & Quincy R. R. Co., 35 Ill. 460.

<sup>5</sup>State Railroad Tax Cases, 2 Otto, 575. And see Appeal Tax Court v. Patterson, 50 Md. 354; *Same v. Gill*, *Id.* 377; *Louisville & Nashville R. R.*

*Co. v. State*, 8 Heisk. 663, 19 Am. Ry. Rep. 107. In such case, where the law provides for separate assessments in each civil district, it will not prevent an officer required to assess omitted property, from assessing the property in gross through several districts: *L. & N. R. R. Co. v. State*. Under the Indiana statute of Dec. 21, 1858, (1 G. & H. 85), railroads in such cases are taxed as an entirety by the appraisers of the several counties through which they run, at a meeting held for that purpose: *Indianapolis, Cincinnati & Lafayette R. R. Co. v. Kilner*, 69 Ind. 71; *S. C. 1 Am. and Eng. R. R. Cas.* 413. And see same case as to the mode of valuation. Under this law there was not, as late as 1868, any provision for the taxation of omitted property: *Ibid.*

the law of said state, and sustained as legal by the Supreme Court of the United States, by adding together the market value of the whole capital, and the whole sum of the company's funded debt, and from the aggregate sum produced by these deducting the assessable value of all real and personal tangible property of the company, and then taking the remainder as the true assessable amount to be taxed; such balance being that which the entire value of the franchise and intangible interests of the corporation amount to.<sup>1</sup> This seems to be the rule established in the State Tax Cases, above cited—a rule which, while we accept it as law, emanating as it does from our highest judicial tribunal, to our mind savors much of taxing the company's indebtedness as well as its property. This ruling is predicated upon the idea that there is something of taxable value in the corporate privilege or franchise over and above the value of the capital stock, but we think the capital stock is the full representative of every interest, and all property which is servient to the enterprise or franchise; that if the franchise has a value in itself, that value adds value to the capital stock. If this supposition be correct, then all extra taxation as for the supposed value of the franchise, is double taxation.

**21. Taxation by municipal corporations.**—It was held in *City of Dubuque v. Illinois Central R. R. Co.*<sup>2</sup> (and overruling *City of Davenport v. Mississippi & Missouri R. R. Co.*<sup>3</sup>), that a municipal corporation has a right to tax a railroad company.<sup>4</sup> Their rolling stock is personal property, and may be taxed by the city which is the principal place of business of the company, for municipal purposes.<sup>5</sup> And where the company is created by the laws of another state, the *situs* of such property, for the purpose of taxation, is that of the property of the manager or agent in whose possession the property is; in contemplation of law it is his.<sup>6</sup>

<sup>1</sup> State Railroad Tax Cases, 2 Otto, 575; *L. & N. R. R. Co. v. State*, *supra*.

<sup>2</sup> 39 Ia. 56; S. C. 8 Am. Ry. Rep. 496, 20 Am. Ry. Rep. 124.

<sup>3</sup> 16 Ia. 348.

<sup>4</sup> And see *Dunleith & Dubuque Bridge Co. v. City of Dubuque*, 32 Ia. 427.

<sup>5</sup> *Dubuque v. Ill. Cent. R. R. Co.*

<sup>6</sup> *Dubuque v. Ill. Cent. R. R. Co.*, *supra*. But where the right to tax is established by one city, no other will possess the power: 39 Ia. 56, per BECK, J. But this question would seem to be not entirely free from doubt in the Iowa court. In the cases of *Dubuque v. Ill. Cent. R. R. Co.*,

Sec. 3275, Rev. Stat. of Iowa, 1860, which provides that if a debtor corporation issues no scrip or evidences of debt in payment of judgments, a tax must be levied to pay the same, confers no independent power of taxation, and does not require a levy in excess of the maximum rate of taxation established by statute.<sup>1</sup> Sec. 710 of the revision is intended to invest counties with the authority necessary to raise all revenue, including whatever may be required for the payment of debts; and the limitations in that section have the same controlling operation which those in a city charter have upon municipal taxation.<sup>2</sup> And an affirmative vote upon a proposition to levy a special tax above that provided by law, to pay off ordinary county indebtedness, failing to specify the date of the levy, or the year to which the taxes were to be applied, will not confer power to levy the same;<sup>3</sup> but the validity of such a tax may be established by subsequent legislation, even pending litigation on the question, and after an opinion filed by the court declaring the tax illegal, but pending a petition for rehearing and before final judgment.<sup>4</sup>

A constitutional provision giving a legislature power to tax corporations, does not operate as a prohibition on all other bodies to tax them, or prevent their being taxed for other purposes than state revenue; and the legislature may authorize municipal corporations to impose such taxes.<sup>5</sup>

**22. Retrospective taxation.**—A tax may be retrospectively laid, if for a lawful purpose;<sup>6</sup> and taxes levied without authority of law may be legalized by subsequent legislative enactments.<sup>7</sup> Thus a tax levied entitled "County Judgment Taxes,"

*supra*, the decision in *Davenport v. Miss. & Mo. Ry. Co.* is not regarded as a binding precedent, because the decision therein was announced by a divided court, and but two of the judges concurred in the reasoning upon which it was based. The *Dubuque* case, however, stands itself in exactly the same position, and therefore is, by its own reasoning, of no force as a precedent. MILLER, Ch. J., and COLE, J., dissent in that case, holding the law to be settled by the *Davenport* case, and *Dubuque & Sioux City R. R. Co. v. City of Dubuque*, 17

Ia. 120, against the right of a city to thus tax rolling stock.

<sup>1</sup> *Iowa R. R. Land Co. v. Sac Co.*, 39 Ia. 124, 9 Am. Ry. Rep. 46.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> *Huck v. Chicago & Alton R. R. Co.*, 86 Ill. 352, 17 Am. Ry. Rep. 419.

<sup>6</sup> *Iowa R. R. Land Co. v. Soper*, 39 Ia. 112, 9 Am. Ry. Rep. 29.

<sup>7</sup> *Iowa R. R. Land Co. v. Soper*, *supra*; *Iowa R. R. Land Co. v. Sac Co.*, 39 Ia. 124, 9 Am. Ry. Rep. 46.



for the purpose of paying certain judgments against a county, in addition to ordinary taxes, is lawful, and a law legalizing it is a general law.<sup>1</sup>

**23. Effect of leasing on taxation.**—Where the charter of a railroad company authorizes it to acquire, by lease, purchase, or otherwise, other roads, etc., and provides that property so acquired shall become the property of the corporation lessee, the courts will give effect to such provision, and property thus leased will become, for purposes of taxation, at least, the property of the lessee.<sup>2</sup> And in distributing the value of the capital stock for taxation among the different counties, in proportion to the length of the main line in each county, such leased roads will be considered parts of the main line.<sup>3</sup>

<sup>1</sup> Iowa R. R. Land Co. v. Soper, . Rep. 138. See in this connection, Appeal Tax Court v. Western Md. R. R. Co., 50 Md. 274; Phil., Wilm. & Balt. R. R. Co. v. Appeal Tax Ct., *Id.* 397.

<sup>2</sup> Huck v. Chicago & Alton R. R. Co., 86 Ill. 352, 17 Am. Ry. Rep. 419.

And see, to the same principle, Hagan v. Hardie, 8 Heisk. 812, 19 Am. Ry.

<sup>3</sup> Huck v. C. & A. R. R. Co., *supra*.



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